TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1932

No. 21

VIVIAN F. BALDWIN AND E. B. BALDWIN,
PETITIONERS,

vs.

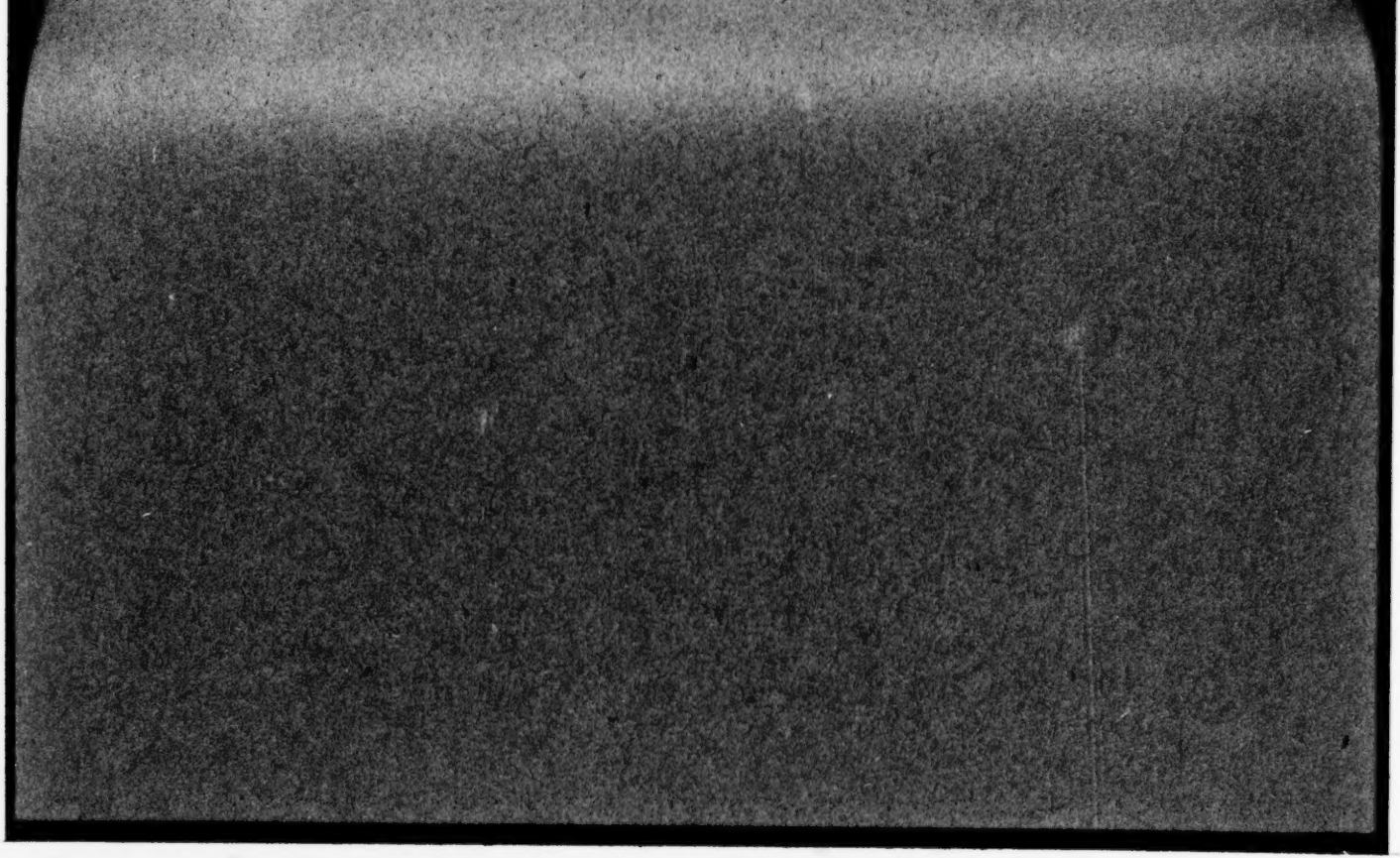
AMERICAN SURETY COMPANY OF NEW YORK

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 21, 1932

CERTIORARI GRANTED APRIL 25, 1932

(36,628)



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[Endorsed]: U. S. District Court, District of Idaho. Filed Jul. 6, 1931. W. D. McReynolds, Clerk. By ————, Deputy.

In the District Court of the United States, for the District of Idaho, Southern Division.

IN EQUITY—No. 1626.

AMERICAN SURETY COMPANY OF NEW YORK, a Corporation,

Plaintiff,

vs.

VIVIAN F. BALDWIN and E. R. BALDWIN,

Defendants.

BILL OF COMPLAINT.

To the Honorable CHARLES C. CAVANAH, Judge of the District Court of the United States, for the District of Idaho:

American Surety Company of New York, a corporation duly created and existing under the laws of the State of New York and a citizen of said State, brings this its bill of complaint against Vivian F. Baldwin and E. R. Baldwin, who are citizens of the State of Idaho, residing in Boise, Ada County, said State, and complains and says:

I.

That at all the times hereinafter mentioned the plaintiff, American Surety Company of New York, was, and now is, a corporation organized and existing under and by virtue of the laws of the State

of New York, and a citizen and inhabitant of the State of New York, having its principal office and place of business at No. 100 Broadway, City of New York, State of New York.

II.

That the defendants Vivian F. Baldwin and E. R. Baldwin now are, and at all the times hereinafter mentioned, were citizens of the State of Idaho, residing in Ada County, said State.

III.

That this is a suit of a civil nature and the matter in controversy exceeds, exclusive of interest and costs, the [1*] sum or value of $3,000.00.

IV.

That during all the times herein mentioned plaintiff was and still is a surety company engaged in the writing of surety bonds of all kinds and is and was authorized to carry on such surety business in the State of Idaho under and by virtue of a compliance with the laws thereof relating to surety companies, and as such Surety Company plaintiff was authorized and empowered to execute and become surety upon the bond or undertaking hereinafter referred to.

V.

That some time prior to the 31st day of May, 1928, the exact date being to this plaintiff unknown, the said Vivian F. Baldwin and E. R. Baldwin commenced an action in the Dis-

*Page-number appearing at the foot of page of original certified Transcript of Record.

trict Court of the Third Judicial District of the State of Idaho, in and for Ada County, against one Ed Anderson and the Singer Sewing Machine Company, a corporation, to recover damages for injuries alleged to have been sustained by the said Vivian F. Baldwin due to the alleged carelessness and negligence of the said Ed Anderson, an employee of said Singer Sewing Machine Company; that such proceedings were had in said cause; that on or about the 31st day of May, 1928, the said Vivian F. Baldwin and E. R. Baldwin recovered a judgment in said court against the said Ed Anderson and against the said Singer Sewing Machine Company, in the sum of $19,500.00 and costs of suit.

VI.

That thereafter and on or about the 27th day of August, 1928, the said Ed Anderson and the said Singer Sewing Machine Company, by and through their respective attorneys, appealed from said judgment so entered against them as aforesaid to the Supreme Court of the State of Idaho; that the said Ed Anderson gave an undertaking for costs only on said appeal [2] as provided in Section 7154 of the Compiled Statutes of Idaho, 1919, but the said Singer Sewing Machine Company, being desirous of staying all proceedings against it on said judgment pending the determination of said appeal, applied to the plaintiff to execute a supersedeas bond or undertaking on said appeal, in the sum of $25,000.00, on behalf of said Singer Sewing Machine Company but not on be-

half of the said Ed Anderson, in accordance with the provisions of Section 7155 of the Compiled Statutes of Idaho, 1919. That in accordance with the request of said Singer Sewing Machine Company, plaintiff executed said undertaking and attached hereto, marked Exhibit "A," is a true and correct copy of said undertaking, and plaintiff prays that the same may be referred to with the same force and effect as if the same were herein set forth at large, and said Singer Sewing Machine Company thereupon filed said undertaking in said cause. That said undertaking was executed solely for the benefit of said Singer Sewing Machine Company and for the sole purpose of staying all proceedings against said Singer Sewing Machine Company on said judgment pending said appeal and the same was not executed at the instance or for the benefit of the said Ed Anderson and said undertaking was not intended to and did not stay execution of said judgment against said Ed Anderson pending the determination of said appeal by the Supreme Court of the State of Idaho.

VII.

That thereafter such proceedings were had on said appeal that on or about the 10th day of April, 1930, the Supreme Court of the State of Idaho rendered its decision in said cause on said appeal, which said decision is reported in Volume 49, Idaho Reports on pages 231 to 239, inclusive; and thereafter and on or about the 22d day of May, 1930, the remittitur from the Supreme Court of the State of Idaho was filed in the [3] *the* District Court

of the Third Judicial District of the State of Idaho, in and for Ada County, the material part or portion of which is as follows, to wit:

> "That the judgment of the District Court of the Third Judicial District in and for Ada County be reversed as to appellant Singer Sewing Machine Company and affirmed as to appellant Anderson. Costs awarded to appellant Singer Sewing Machine Company in the sum of $488.35. Costs as against appellant Anderson to respondents, in the sum of $40.00."

VIII.

That thereafter and on or about the 24th day of May, 1930, the said District Court of the Third Judicial District of the State of Idaho, in and for Ada County, pursuant to said remittitur, made and entered a judgment in said cause dismissing said cause as to the defendant Singer Sewing Machine Company and awarding said Singer Sewing Machine Company judgment against said Vivian F. Baldwin and E. R. Baldwin for its costs on said appeal in the sum of $488.55, a true copy of which judgment is hereto attached, marked Exhibit "B," and plaintiff prays that it may refer thereto with the same force and effect as if the same were herein set forth at large. That by virtue of the filing of said remittitur and the entry of said judgment (Exhibit "B"), the said District Court lost all jurisdiction of the person of the said Singer Sewing Machine Company and of the person of plaintiff herein as surety on said undertaking on appeal (Exhibit "A").

IX.

That thereafter, to wit: On June 23, 1930, one of the attorneys of record for said Vivian F. Baldwin and E. R. Baldwin in said cause against said Ed Anderson and said Singer Sewing Machine Company, without notice to either said Singer Sewing Machine Company or this plaintiff and without their knowledge, represented to the Honorable Charles F. Koelsch, one of the Judges of the Third Judicial District of the State of Idaho, in and [4] for Ada County, that this plaintiff was also surety for said Ed Anderson on said undertaking (Exhibit "A"), and that judgment should be forthwith entered against this plaintiff for failure to pay the judgment (Exhibit "B") theretofore entered against said Ed Anderson, which representations were wrong, false and fraudulent and were a fraud upon said District Court and upon the Honorable Charles F. Koelsch, one of the Judges thereof, and said attorney for the defendants herein (plaintiffs in said action), at the time of making said representations, also presented to the Honorable Charles F. Koelsch a draft of a judgment against this plaintiff on said undertaking and requested that the same be signed as the judgment of said Court, and the Honorable Charles F. Koelsch thereupon and at Chambers but not in open court and without notice to either the said Singer Sewing Machine Company or this plaintiff and without their knowledge or consent, signed the draft of said judgment so presented to him as aforesaid and filed the same with the Clerk of said court. That attached hereto and marked

Exhibit "C" is a true and correct copy of the judgment so signed and filed as aforesaid, and plaintiff prays that it may refer thereto with the same force and effect as if said judgment were herein set forth at large. That while said judgment purports to state that the motion therefor was made in open court and that said judgment was signed and entered in open court, the said judgment was in truth and in fact, as plaintiff is informed and believes and so alleges the fact to be, made and signed at Chambers and not in open court and no written motion whatsoever was made or filed for the entry of said judgment and no motion was made in open court for the entry of said judgment; that the minutes of the Court made no reference whatsoever to said proceedings or to any application, motion or request by the attorney for said Vivian F. Baldwin and E. R. Baldwin for the entry of any judgment against this plaintiff on said undertaking [5] or that any judgment was or should be entered against this plaintiff as surety on said undertaking, or otherwise.

X.

That no notice whatsoever was given to this plaintiff or to its statutory agent for the service of process, or to any of its agents or representatives, of said application by the attorneys for said Vivian F. Baldwin and E. R. Baldwin for judgment against this plaintiff, and plaintiff did not learn that said judgment had been entered against it until on or about the 24th day of June, 1930, and plaintiff was prevented by the wrongful conduct of said

defendants and their attorneys from presenting its objections and defenses to the entry of said judgment before said judgment was so entered and filed. That said judgment is wholly void in that the said District Court had no jurisdiction of the person of this plaintiff when said judgment was entered and had no power to render said judgment against this plaintiff, and plaintiff was not and neither was said Singer Sewing Machine Company, the principal named in said undertaking, in default in any of the obligations assumed by said undertaking, and this plaintiff had not consented by the terms of said undertaking to the entry of judgment against it because of any default on the part of said Ed Anderson, but only in the event that the judgment appealed from should be affirmed in whole or in part as against the Singer Sewing Machine Company, the principal named in said undertaking, and when said Singer Sewing Machine Company was dismissed from said action as provided in Exhibit "B" hereto attached, this plaintiff as its surety on said appeal was likewise dismissed from said action and no judgment could thereafter be entered against this plaintiff under Section 7155, Compiled Statutes of Idaho, 1919, by consent or otherwise, or without service of process and without an opportunity to this plaintiff to be heard prior to the entry of said judgment [6] and to present its objections and defenses thereto; that the entry of said judgment (Exhibit "C") against this plaintiff denied to plaintiff the equal protection of the laws and due process of law as guaranteed by the

Fourteenth Amendment to the Constitution of the United States.

XI.

That immediately after plaintiff was informed of the entry of said judgment and during the term of court in which said judgment was entered, to wit: On the 26th day of June, 1930, this plaintiff through its attorneys served upon the attorneys for the defendants herein—plaintiffs in the action in the state court, and filed in said state court a motion to vacate and set aside said judgment on the ground that the same was void because said undertaking (Exhibit "A") shows on its face that it was given in behalf of said Singer Sewing Machine Company and not on behalf of said Ed Anderson and that it stayed execution only against said Company and that the reversal of the judgment against the Singer Sewing Machine Company and the dismissal of said Company from said action as provided in the judgment entered upon the filing of the remittitur from the Supreme Court (Exhibit "B") discharged plaintiff from all liability under said undertakng and that said District Court thereupon lost jurisdiction of the person of said Singer Sewing Machine Company, as well as of this plaintiff. That such proceedings were had on said motion to vacate and set aside said judgment that said District Court, after examining and considering said undertaking (Exhibit "A") and the statutes of the State of Idaho under which said undertaking was given and the decision of the Idaho Supreme Court in said cause (49 Ida., p. 231) and the judgment so

entered upon the filing of the remittitur (Exhibit "B"), construed said undertaking and held that it did not authorize the entry of any judgment against this plaintiff because of the default or failure of [7] the said Ed Anderson to pay the judgment theretofore entered against him as aforesaid in said action, and said District Court thereupon sustained the motion of this plaintiff and on the 12th day of August, 1930, said District Court made and entered an order vacating and setting aside said judgment on the ground that the same was void.

XII.

That the defendants Vivian F. Baldwin and E. R. Baldwin, plaintiffs in said action in the state court, thereupon appealed to the Supreme Court of the State of Idaho from the order vacating and setting aside said judgment and such proceedings were had on said appeal that on the 2d day of May, 1931, the Supreme Court of Idaho reversed said order so made on the 12th day of August, 1930, by said District Court vacating and setting aside said judgment, and said Supreme Court held in substance and effect that the application to the District Court for judgment on said undertaking presented a judicable inquiry, and that the District Court was without power or authority to vacate and set aside said judgment by a motion to vacate, and said Supreme Court of Idaho further held on said appeal that it was without power to construe said undertaking on the appeal so taken by the defendants herein from the order vacating said judgment and that it could not on said appeal determine or construe said

undertaking or determine whether the District Court had jurisdiction of the person of plaintiff at the time said judgment (Exhibit "C") was entered against this plaintiff, or whether said District Court had any power or authority to enter any judgment whatsoever against this plaintiff after said Singer Sewing Machine Company had been dismissed from said action. Plaintiff further shows and alleges that it did not know until long after said appeal had been determined and decided that said judgment against plaintiff [8] (Exhibit "C") had been made and entered at Chambers and not in open court, and said question was therefore not presented to or considered by the Supreme Court of the State of Idaho on said appeal.

XIII.

That in thus refusing to construe said undertaking for the purpose of ascertaining whether said District Court had jurisdiction of the person of plaintiff on June 23, 1930, when said judgment (Exhibit "C") was entered against it on said undertaking, and in refusing to determine or decide whether said District Court had power to enter the judgment purporting to have been so entered by said court but which, as hereinbefore alleged, was actually entered at Chambers, the Supreme Court of the State of Idaho departed from and changed the rule of decision and appellate practice and procedure which had been followed, sanctioned and approved by said court for upwards of forty years immediately prior to said decision, and the Supreme Court of the State of Idaho by said decision denied to plaintiff

the equal protection of the laws and due process of law in violation of the provisions relating thereto in the Fourteenth Amendment to the Constitution of the United States.

XIV.

That the remittitur from the Supreme Court on the appeal from said order vacating said judgment was filed in said District Court on June 3, 1931, and thereafter and on June 17, 1931, the defendants herein caused execution to issue upon said judgment (Exhibit "C") and caused said execution to be levied upon certain securities of this plaintiff deposited with the treasurer of the State of Idaho pursuant to the provisions of Section 5104 of the Compiled Statutes of Idaho 1919, to wit: Upon certain United States Fourth Liberty Loan Bonds bearing 4¼% interest of the par value of $25,000.00, and pursuant to such levy the [9] sheriff of Ada County has noticed said securities for sale on the 5th day of August, 1931, at 10:00 o'clock A. M. at the front door of the courthouse in Boise, Ada County, Idaho, and the proceeds from said securities will, as plaintiff is informed and believes and so alleges the fact to be, be paid over to the defendants herein and applied in satisfaction of the judgment which said defendants hold against the said Ed Anderson and which judgment this plaintiff has never assumed or agreed to pay and on which it has no liability whatsoever.

XV.

That at all times prior to on or about the 4th day of June, 1931, plaintiff and its attorneys relied

upon the recitals in said judgment (Exhibit "C") to the effect that the said Vivian F. Baldwin and E. R. Baldwin had moved the said state court for judgment on said undertaking (Exhibit "A"), instead of applying to the Judge of said court at Chambers, and this plaintiff had assumed as it had a right to assume, that said judgment was made in open court when in truth and in fact it was made in Chambers; that immediately upon obtaining information to the effect that said judgment had been made and entered at Chambers, this plaintiff moved the said District Court of the Third Judicial District of the State of Idaho in and for Ada County, to correct the recitals in said judgment in that respect and to make said judgment speak the truth so as to show that said judgment was actually entered at Chambers and not in open court and said motion is now pending before said District Court undetermined and undecided.

XVI.

That plaintiff has a good, valid and meritorious defense to any judgment on said undertaking (Exhibit "A") and particularly on the ground that said undertaking was not a joint [10] undertaking for both the Singer Sewing Machine Company and Ed Anderson, but was intended to be and was in fact an undertaking executed solely on behalf of said Singer Sewing Machine Company and for its benefit and not for the benefit of said Ed Anderson.

XVII.

That when said Singer Sewing Machine Company

was dismissed from said cause and awarded an affirmative judgment for its costs on the first appeal therein pursuant to the decision of the Supreme Court of the State of Idaho, reported as aforesaid in 49 Idaho Reports, pp. 231–239, inclusive, both said Singer Sewing Machine Company and plaintiff herein were released and relieved from any and all further liability in said cause. That the only opportunity plaintiff has had to present said defense to a court for adjudication was on its motion to vacate the judgment against it (Exhibit "C") and, as heretofore alleged, said District Court sustained the said motion after a full and complete consideration of said undertaking and made and entered an order vacating and setting aside said judgment, but, as heretofore alleged, said order was thereafter reversed and set aside by the Supreme Court of the State of Idaho without considering the merits of the case and without determining whether said judgment (Exhibit "C") had been legally or properly entered against this plaintiff, or whether any judgment whatsoever could be entered against plaintiff on said undertaking after said Singer Sewing Machine Company had been dismissed from said cause.

XVIII.

That plaintiff has no plain, speedy or adequate remedy at law against the judgment so entered against it as aforesaid; that said judgment is most unjust, inequitable, unconscionable and unfair and the manner in which the same was obtained is and was a fraud upon this plaintiff and upon said Dis-

trict Court, and [11] unless the defendants, their agents, attorneys and representatives, including the sheriff of Ada County, Idaho, be enjoined and restrained from selling the securities of this plaintiff now on deposit with the treasurer of the State of Idaho as aforesaid under the execution heretofore levied and notice of sale heretofore given as aforesaid, or otherwise, and from suing out any other or further executions and levying or attempting to levy and sell said securities, this plaintiff will be deprived of its property without due process of law and denied the equal protection of the laws, contrary to and in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States, and it will suffer great and irrepa rable injury and the loss of assets of a value in excess of $25,000.00; that if said securities be sold and the proceeds thereof paid over to the defendants, such proceeds will immediately be paid out and disbursed and said defendants are, as plaintiff is informed and believes and so alleges the fact to be, insolvent and unable to respond in damages for any loss that plaintiff may sustain by reason of such wrongful sale and loss of its securities and are and will be unable to repay or restore to plaintiff the proceeds so wrongfully received from the sale of said securities. That the sale of said securities will deprive plaintiff of the right to do a surety business in the State of Idaho and result in the cancellation of its license, certificate and authority to do business in said state; that the surety business is the only business in which plaintiff is engaged and from which it derives a profit.

WHEREFORE, plaintiff prays this Honorable Court:

(a) That a writ of injunction may issue, preliminary until final hearing and perpetual thereafter, enjoining and restraining the said defendants and each of them, their agents, attorneys, representatives and assigns, including the sheriff of Ada County, Idaho, his deputies and successors in office, [12] and each and every of them, from enforcing or attempting to enforce as against this plaintiff the said judgment bearing date on or about the 23d day of June, 1930, and purporting to have been made and entered by the District Court of the Third Judicial District of the State of Idaho, in and for Ada County, in the cause wherein the defendants Vivian F. Baldwin and E. R. Baldwin were plaintiffs and Ed Anderson and Singer Sewing Machine Company were defendants, a copy of which is attached to the bill of complaint as Exhibit "C," and from applying for and seeking to obtain execution thereon and from levying or attempting to levy upon or selling or attempting to sell under any such execution or under any order or writ issued or purporting to be issued under said judgment or for the enforcement thereof, the bonds and securities of this plaintiff on deposit with the treasurer of the State of Idaho under Section 5104 of the Compiled Statutes of Idaho, and from harassing and annoying this plaintiff with attempting to collect or threatening to collect or enforce said judgment or collecting or attempting to collect the same from this plaintiff.

(b) That said defendants and each of them, their agents, attorneys, representatives and assigns, and each and every of them, be ordered and directed to forthwith desist and refrain from taking any further proceedings under the execution issued out of the District Court of the Third Judicial District of the State of Idaho on or about the 17th day of June, 1931, for the enforcement of said judgment and under which said defendants have caused the sheriff of said Ada County to levy upon the bonds and securities of this plaintiff on deposit with the treasurer of the State of Idaho under said Section 5104 of the Compiled Statutes of Idaho, and to desist and refrain from proceeding further with the sale of said securities; that they be [13] ordered and directed to abandon, cancel and annul all notices given and steps taken for levying upon and selling said securities.

(c) That plaintiff may have such other and further relief as may be just and equitable in the premises, and for its costs herein.

RICHARDS & HAGA,
McKEEN F. MORROW,
MARTIN & MARTIN,
FRANK MARTIN,
Solicitors for Plaintiff.
Residence: Boise, Idaho.

OLIVER O. HAGA,
Of Counsel.

State of Idaho,
County of Ada,—ss.

Oliver O. Haga, being first duly sworn, upon his

oath, deposes and says: That he is one of the attorneys of record for American Surety Company of New York, plaintiff in the above-entitled suit; that he makes this verification for and on behalf of said plaintiff for the reason that he is more familiar with the facts set forth in said bill of complaint than is any of the officers of said plaintiff and for the further reason that no officer of said plaintiff resides within or is now in the State of Idaho or Ada County, where this affiant resides; that he has obtained his information as to the matters set forth in said bill of complaint from the official records of the District Court of the Third Judicial District of the State of Idaho, in and for Ada County, and from the records and decisions of said court and from the Supreme Court of the State of Idaho and from other sources which he believes to be reliable; that he has read the above and foregoing complaint and believes the facts therein stated to be true.

OLIVER O. HAGA.

Subscribed and sworn to before me this 6th day of July, 1931.

[Seal] H. M. JEFFREY,
Notary Public for Idaho,
Residence: Boise, Idaho. [14]

EXHIBIT "A."

In the District Court of the Third Judicial District of the State of Idaho, in and for the County of Ada.

VIVIAN F. BALDWIN and E. R. BALDWIN,
Plaintiffs,

vs.

SINGER SEWING MACHINE COMPANY, a Corporation, and ED ANDERSON,
Defendants.

UNDERTAKING ON APPEAL.

Whereas the defendant, Singer Sewing Machine Company, a corporation, in the above-entitled action has appealed to the Supreme Court of the State of Idaho from the judgment made and entered against it in the above-entitled action and in the above-entitled court in favor of the plaintiffs in said action on the 31st day of May, 1928, for the sum of Nineteen Thousand Five Hundred ($19,500.00) Dollars and for Seventy-three and 70–100 ($73.70) Dollars costs in said suit, making a total of Nineteen Thousand Five Hundred Seventy-three and 70–100 ($19,573.70) Dollars, and from the whole of said judgment;

AND WHEREAS, the said appellant, Singer Sewing Machine Company, a corporation, is desirous of staying the execution of said judgment so appealed from;

NOW, THEREFORE, the undersigned American Surety Company, a corporation authorized to, and doing business in the State of Idaho, in consideration of the premises and of such appeal on the part of said appellant, Singer Sewing Machine Company, a corporation, does hereby acknowledge itself firmly bound in the sum of Twenty-five Thousand ($25,000.00) Dollars, gold coin of the United States, that if the said judgment appealed [15] from, or any part thereof, be affirmed, or the appeal dismissed, the appellant will pay in gold coin of the United States of America, the amount directed to be paid as to which said judgment shall be affirmed, if affirmed only in part, and all damages and costs which may be awarded against the appellant upon the appeal, and that if the said appellant does not make such payment within thirty days from the filing of the remittitur from the Supreme Court in the court from which the appeal is taken, judgment may be entered on motion of the respondents in their favor and against the undersigned surety for the said sum of Nineteen Thousand Five Hundred Seventy-three and 70–100 ($19,573.70) Dollars, together with the interest that may be due thereon and the damages and costs which may be awarded against the said appellant, Singer Sewing Machine Company, upon the appeal.

IN WITNESS WHEREOF, the said American Surety Company, has caused its name and seal to be

attached hereto by its proper officers and agents at Boise, Idaho, this 28th day of August, 1928.

AMERICAN SURETY COMPANY OF NEW YORK.

By HOWARD E. STEIN,
Attorney-in-fact.

Countersigned:

HOWARD E. STEIN,
Agent at Boise, Idaho.

Countersigned:

(Seal) RICHARDS & HAGA.
O. O. HAGA.

It is hereby agreed that the within bond is hereby accepted in so far as the amount is concerned without regard [16] to it being double the amount of the judgment.

Dated at Boise, Idaho, this 29th day of August, 1928.

JAMES F. AILSHIE, Jr.,
J. R. SMEAD,
Attorneys for Plaintiffs.
Residence: Boise, Idaho. [17]

EXHIBIT "B."

In the District Court of the Third Judicial District of the State of Idaho, in and for the County of Ada.

VIVIAN F. BALDWIN and E. R. BALDWIN,
Plaintiffs,

vs.

SINGER SEWING MACHINE COMPANY, a Corporation, and ED ANDERSON,
Defendants.

JUDGMENT.

This cause coming on regularly to be heard on the 21st day of May, 1928, before the court and a jury, and a judgment being regularly and duly entered and filed on May 31st, 1928, whereby the plaintiffs were given judgment against the defendants in the sum of Nineteen Thousand Five Hundred Dollars; thereafter the said defendants having appealed to the Supreme Court of the State of Idaho, from the judgment made and entered herein, and thereafter, and on May 10th, 1930, the Supreme Court of the State of Idaho made and entered its decision in this matter reversing said judgment as to the defendant Singer Sewing Machine Company, and the remittitur of the Supreme Court having been duly issued out of the said Supreme Court and filed with the Clerk of this court on May 22nd, 1930, by the terms of which it was ordered and adjudged that the judgment of the District Court made and

entered as hereinabove set out against the Singer Sewing Machine Company be reversed and the cause of action dismissed as to said defendant, Singer Sewing Machine Co., and affirmed as to defendant Ed. Anderson.

Now, therefore, in accordance with the said decision and remittitur and in compliance therewith, [18]

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, AND THIS DOES ORDER, ADJUDGE AND DECREE that the plaintiffs Vivian F. Baldwin and E. R. Baldwin take nothing from defendant Singer Sewing Machine Co., and that the said cause of action be, and the same is hereby dismissed as to the defendant Singer Sewing Machine Company, a corporation.

And in further complaince with said remittitur of the Supreme Court of the State of Idaho, the said defendant Singer Sewing Machine Company, a corporation, is hereby given judgment against the said Vivian F. Baldwin and E. R. Baldwin for the sum of Four Hundred Eighty-eight and 55–100 Dollars ($488.55) as and for its costs incurred in the Supreme Court, together with interest thereon at the rate of seven per cent per annum from May 10th, 1930; and the said defendant, Singer Sewing Machine Company, is hereby given judgment against the said plaintiffs Vivian F. Baldwin and E. R. Baldwin for the sum of $ ———, its costs incurred upon the trial of this cause in the District Court, making a total judgment that the said Singer Sewing Machine Company, a cor-

poration, do have and recover of and from the said Vivian F. Baldwin and E. R. Baldwin in the sum of $ ——.

Done and dated in open court this 24 day of May, 1930.

DANA E. BRINCK,
District Judge. [19]

EXHIBIT "C."

In the District Court of the Third Judical District of the State of Idaho, in and for the County of Ada.

VIVIAN F. BALDWIN and E. R. BALDWIN,
Plaintiffs,

vs.

ED ANDERSON and AMERICAN SURETY COMPANY OF NEW YORK, a Corporation, Surety.

Defendants,

JUDGMENT.

In the above-entitled cause the plaintiffs, having recovered judgment herein, on the 31st day of May, 1928, against the defendant Ed. Anderson and Singer Sewing Company, a corporation, for the sum of $19,500.00 with interest at seven per cent per annum from said date, and the said defendant Ed. Anderson and Singer Sewing Company having appealed to the Supreme Court of the State of Idaho from the said judgment, and an undertaking having been executed by the American Surety Company

of New York, a corporation, authorized to act as surety in the State of Idaho, having been given to plaintiffs as respondents upon the said appeal for the stay of execution of said judgment, pending said appeal in accordance with the provisions of Section 7155, Idaho Compiled Statutes, and by which undertaking the said American Surety Company of New York, a corporation, did undertake and obligate itself to the plaintiffs herein under the said statutory obligations in the sum of $25,000.00, and having thereby obligated itself to the effect that if the said judgment so appealed from, or any part thereof, should be affirmed the said American Surety Company of New York, a corporation, would pay the amount directed to be paid by the said judgment, or part thereof which should be affirmed, and all damages and costs which should be awarded plaintiffs, and providing that upon the failure to make payment [20] within thirty days after the filing of the remittitur from the Supreme Court in the above-entitled District Court, from which said appeal was taken, judgment might be entered on motion of said plaintiffs in their favor against the said surety company, to-wit, the American Surety Company of New York, for such amount together with interest that might be due thereon, and the damages and which might be awarded in favor of plaintiffs upon the appeal; and said appeal to the Supreme Court of the State of Idaho by the said defendant Ed. Anderson and Singer Sewing Machine Company having been affirmed in part and reversed in part, viz:

"Reversed as to appellant Singer Sewing Machine Company, affirmed as to appellant Anderson."

and the remittitur from the Supreme Court of Idaho to the above-entitled District Court having been filed in the office of the Clerk of the above-entitled Court on May 22nd, 1930, and costs having been taxed in favor of plaintiffs and against the defendant Ed. Anderson in the sum of $40.00, and more than thirty days having elapsed since the filling of said remittitur from the Supreme Court in the District Court, and defendant Ed. Anderson having failed to pay the said judgment as affirmed, or any part thereof, and the plaintiffs having moved the Court for a judgment against the said American Surety Company of New York, a corporation, and the court being fully advised in the premises:

DOES HEREBY ORDER AND ADJUDGE, That the plaintiffs do have and recover of and from the American Surety Company of New York, a corporation, the sum of $19,500.00, together with the sum of $2,817.21 interest thereon at the rate of seven per cent per annum from the 31st day of May, 1928, to the 23rd [21] day of June, 1930, together with $40.00 costs as provided for in the remittitur of the Supreme Court of Idaho, making the total sum of $22,357.21, together with interest thereon at the rate of seven per cent per annum from date hereof until paid, and that the plaintiffs have execution therefor.

Done in open court this 23d day of June, 1930.

CHARLES F. KOELSCH,
District Judge. [22]

[Endorsed]: Filed Jul. 6, 1931.

[Title of Court and Cause.]

MOTION FOR TEMPORARY INJUNCTION.

Comes now the plaintiff in the above-entitled suit, by its solicitors, Messrs. Richards & Haga, and Martin & Martin, and moves this Honorable Court to grant a writ of injunction against said defendants and each of them, and their and each of their agents, attorneys, clerks, employees and representatives and all persons acting under the authority or direction of said defendants, or either of them, or their attorneys, pending this suit and until the further order of this court, conformable to the prayer of plaintiff's bill of complaint in this cause.

This motion is based on plaintiff's verified bill of complaint this day filed.

RICHARDS & HAGA,
McKEEN F. MORROW
MARTIN & MARTIN,
Solicitors for Plaintiff.
Residence: Boise, Idaho.
OLIVER O. HAGA,
Of Counsel. [23]

[Endorsed]: Filed Jul. 9, 1931.

[Title of Court and Cause—No. 1626.]

STIPULATION RE CONTINUING HEARING OF COMPLAINANT'S MOTION FOR TEMPORARY INJUNCTION.

It is stipulated by and between Messrs. Richards and Haga, McKeen F. Morrow, Martin and Martin, Frank Martin, and Oliver O. Haga, solicitors for complainant, and James F. Ailshie, Jr., and J. R. Smead, solicitors for defendants, that the hearing of complainant's motion for a temporary injunction in the above-entitled cause heretofore fixed for the hour of 10 o'clock A. M., on Thursday, the 9th day of July, 1931, be continued to the hour of 10 o'clock A. M., on Tuesday, July 28th, 1931.

It is further stipulated and agreed that defendants by entering into this stipulation do not waive any rights or defenses to complainant's bill of complaints or motion based thereon, and expressly reserve each and every objection and exception for which they may legally contend, including all objections to the jurisdiction of the court.

It is further agreed that defendants will file such affidavits, records, motions, pleadings or other matters, as they may see fit, on or before the 21st day of July, 1931, and that complainant shall serve any counter-showing on or [24] before July 25th, 1931, and defendants have to the hour of 10 o'clock A. M., July 28th, 1931, to reply to complainant's counter-showing.

Briefs of both parties to be served and filed at the time of hearing.

Dated this 8th day of July, 1931.

RICHARDS & HAGA,
McKEEN F. MORROW,
OLIVER O. HAGA,
MARTIN & MARTIN,
FRANK MARTIN,
Solicitors for Complainant.
JAMES F. AILSHIE, Jr.,
J. R. SMEAD,
Solicitors for Defendants. [25]

[Endorsed]: Filed Jul. 22, 1931.

[Title of Court and Cause—No. 1626.]

SHOWING IN OPPOSITION TO MOTION FOR TEMPORARY INJUNCTION.

To the Honorable CHARLES C. CAVANAH, Judge of the District Court of the United States for the District of Idaho.

Come now Vivian F. Baldwin and E. R. Baldwin, defendants above named, by and through their solicitors, James F. Ailshie, Jr., and J. R. Smead, and in opposition to complainant's motion for a temporary writ of injunction herewith file the following affidavits, certified records and other documents as follows, to wit:

Affidavit of Honorable Charles F. Koelsch.
Affidavit of James F. Ailshie, Jr.
Affidavit of J. R. Smead.

Certified copy of transcript on appeal to the Supreme Court of the State of Idaho in Case No. 5653 entitled Vivian F. Baldwin and E. R. Baldwin, Appellants, against Ed Anderson and American Surety Company of New York, a Corporation, Respondents.

Certified copy of opinion of the Supreme Court of the State of Idaho dated May 2, 1931, in said case No. 5653.

Certified copy of judgment entered by the Supreme Court of the State of Idaho in said Case No. 5653, together with certified copy of filing of remittitur of the Supreme Court of Idaho in said Case No. 5653 in the District Court of the Third Judicial District of the State of Idaho, in and for the County of Ada. [26]

Certified copy of writ of execution issued June 17, 1931, out of the District of the Third Judicial District of the State of Idaho in and for Ada County in the case of Vivian F. Baldwin and E. R. Baldwin, plaintiffs, against Ed. Anderson and American Surety Company of New York, a Corporation, defendants, together with:

Affidavit of J. Emer Harris.

Affidavit of James Brandon.

Affidavit of John McGrath.

Certified copy of notice of levy of writ of execution.

Notice of sheriff's sale.

From the records and files of Case No. 11860 in the District Court of the Third Judicial District

of the State of Idaho in and for the County of Ada.

Notice of motion of American Surety Company, together with motion to vacate and set aside the judgment against it entered June 23, 1930, and moving papers in support thereof.

Certified copy of objections of Vivian F. Baldwin and E. R. Baldwin to the consideration of American Surety Company's motion to vacate and set aside the judgment of June 23.

Certified copy of certificate and affidavits filed in opposition to American Surety Company's motion to vacate and set aside, together with the following:

Certified copy of certificate of Charles F. Koelsch as Judge of the Third Judicial District of the State of Idaho.

Reporter's transcript, together with order of Charles F. Koelsch as Judge of the Third Judicial District of the State of Idaho settling the same as a correct record of statement made by him on hearing of American Surety Company's motion to vacate and set aside held June 30, 1931.

Certified copy of affidavit of James F. Ailshie, Jr.

Certified copy of affidavit of J. R. Smead.

Certified copy of notice of appeal of American Surety Company to the Supreme Court of the State of Idaho from that certain judgment entered June 23, 1930.

Certified copy of undertaking for costs on said appeal filed by American Surety Company.

Certified copy of notice of appeal of American Surety Company from that certain order made and entered on July 13, 1931, denying and overruling American Surety Company's motion to vacate the judgment of June 23, 1930.

Certified copy of undertaking for costs on said appeal filed by American Surety Company. [27]

Certified copy of application of American Surety Company for order for reporter's transcript.

Certified copy of minutes of the District Court of the Third Judicial District for the State of Idaho for July 13, 1931.

Certified copy of order entered July 13, 1931.

Certificate of Clerk of the Third Judicial District of the State of Idaho in and for the County of Ada.

Defendants pray that the plaintiff's motion for a temporary writ of injunction be denied and that they recover their costs and disbursements herein and defendants will ever pray.

JAMES F. AILSHIE, Jr.,
J. R. SMEAD,
Solicitors for Defendants.

Residence and Postoffice Address: Boise, Idaho.

Service admitted this 21st day of July, 1931.

RICHARDS & HAGA,
MARTIN & MARTIN,
Solicitors for Complainant. [28]

DEFENDANT'S SHOWING No. 1.

5.

In the District Court of the Third Judicial District of the State of Idaho, in and for the County of Ada.

VIVIAN F. BALDWIN and E. R. BALDWIN,
Plaintiffs,

vs.

SINGER SEWING MACHINE COMPANY, a Corporation, and ED. ANDERSON,
Defendants.

JUDGMENT.

The plaintiffs in the above-entitled cause having heretofore filed their complaint herein and the defendants and each of them having thereafter appeared and filed respectively their separate answers to said complaint; and thereafter, on the 21st day of May, 1928, said cause having come on for trial of the issues so made up; and the jury having been duly impaneled and sworn to try said cause, and thereupon plaintiffs and defendants having offered evidence both oral and documentary in support of their respective allegations, and the said jury having been duly instructed by said court and having

heard argument by the respective counsel of record of said parties herein, and having thereupon retired to consider of their verdict;

And the said jury having thereafter returned to court and having returned in said cause their verdict, which was duly read and filed herein, in the following language, to wit: [32]

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We, the jury, in the above-entitled cause find for the plaintiffs, Vivian F. Baldwin and E. R. Baldwin and against the defendants, Singer Sewing Machine Company, a corporation, and Ed. Anderson in the sum of $19,500.00.

J. E. BURNETT, Foreman.

No. 11860—Filed 5:22 P. M., May 25, 1928. Stephen Utter, Clerk. By B. Clyde Eagleson, Deputy.

NOW, THEREFORE, it is hereby ordered, adjudged and decreed that the said plaintiffs, Vivian F. Baldwin and E. R. Baldwin, do have and recover from the said defendants, Singer Sewing Machine Company, a corporation, and Ed. Anderson, the sum of Nineteen Thousand Five Hundred ($19,500.00) Dollars together with plaintiffs' costs in this behalf laid out and expended, which are hereby taxed at the sum of $

CLINTON H. HARTSON,
District Judge.

[Endorsed]: Filed May 31st, 1928.

[Title of Court and Cause.]

NOTICE OF APPEAL.

To Vivian F. Baldwin and E. R. Baldwin, Plaintiffs, James F. Ailshie, Jr., and J. R. Smead, Their Attorneys, and to Stephen Utter, Clerk of the Above-entitled Court:

You and each of you will please take notice, that

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[33] the defendants, Singer Sewing Machine Company, a corporation, and Ed Anderson, hereby appeal to the Supreme Court of the State of Idaho, from that certain judgment entered in the above-entitled action on the 31st day of May, 1928, for the sum of $19,573.70, against the defendants, and each of them, and from the whole thereof.

Dated August 27, 1928.

MARTIN & MARTIN and
H. B. WALKER,
Attorneys for Defendants.
Residence: Boise, Idaho.

(Duly served.)

[Endorsed]: Filed August 27th, 1928. [34]

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[Title of Court and Cause.]

NOTICE OF MOTION.

To the Above-named Plaintiffs and to James F. Ailshie, Jr., and J. R. Smead, Their Attorneys:

YOU AND EACH OF YOU are hereby notified that on the 28th day of June, 1930, at 10:00 o'clock A. M., or as soon thereafter as counsel can be heard

at the courtroom of the above-entitled court in Boise, Idaho, the undersigned American Surety Company of New York will move the Court to vacate the judgment made and entered in the above-entitled action in favor of the above-named plaintiffs and against the said American Surety Company of New York on the 23d day of June, 1930, and to stay all proceedings issued under execution upon said judgment.

Said motion will be made upon the records and files in this action, including the supersedeas bond on which said judgment is based, and the affidavit of McKeen F. Morrow. A copy of said motion [48]

to which is attached a copy of said supersedeas bond and a copy of said affidavit of McKeen F. Morrow, is hereto attached and herewith served upon you.

Dated this 26th day of June, 1930.

RICHARDS & HAGA,
MARTIN & MARTIN,
Attorneys for American Surety Company of New York, a Corporation.

[Title of Court and Cause.]

MOTION.

Comes now American Surety Company of New York, a New York corporation, and moves this Honorable Court to vacate and set aside that certain judgment against said American Surety Company of New York, made and entered in the above-entitled cause on the 23d day of June, 1930, upon the following grounds and for the following reasons, to wit:

I.

That said judgment is void in that the supersedeas bond on which said judgment is based shows on its face that it was given on the appeal of the Singer Sewing Machine Company in this action and for the purpose of staying execution against that company, that said bond did not stay or purport to stay said judgment against the other defendant, Ed. Anderson, and it appears from said judgment and the records and files in this action

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that the Supreme [49] Court of Idaho reversed the judgment against said appellant, Singer Sewing Machine Company, from which it appealed, and that upon the remittitur from said Supreme Court this Court vacated the said judgment appealed from as to Singer Sewing Machine Company, dismissed said action as against it, and entered judgment in its favor against plaintiffs herein on or about May 24, 1930.

II.

That said judgment is void in that the supersedeas bond on which said judgment is based shows on its face that the said American Surety Company of New York executed said bond solely in consideration of the appeal by Singer Sewing Machine Company from the judgment entered herein on or about May 31, 1928, and said appeal was sustained and there has, therefore, been no breach of the condition of the bond.

III.

That the enforcement of said judgment is contrary to good conscience and equity because the said

supersedeas bond on which said judgment is based was executed solely in consideration of that certain appeal taken by said Singer Sewing Machine Company from the judgment herein entered on or about May 31, 1928, and for the purpose of staying execution on said judgment against said Singer Sewing Machine Company and the appeal of said Singer Sewing Machine Company was sustained and pursuant to the remittitur from the Supreme Court of Idaho, judgment was entered herein on or about

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[50] May 24, 1930, to the effect that plaintiffs take nothing in said action against said Singer Sewing Machine Company, and that the case be dismissed as to said company, and that Singer Sewing Machine Company have judgment against plaintiffs herein for the sum of Five Hundred Twenty-two and 85–100 Dollars ($522.85), and it is, therefore, contrary to good conscience and equity to enter judgment against the said American Surety Company of New York, as surety, when no recovery can be had against its sole principal on said supersedeas bond.

IV.

That said judgment was entered without notice to the said American Surety Company of New York or the said Singer Sewing Machine Company.

And said American Surety Company of New York further moves this Court to stay all proceedings under execution upon said judgment pending the determination of this motion.

Said motion is based on the records and files in

this action, including a copy of the said supersedeas bond hereto attached and made a part hereof, and the affidavit of McKeen F. Morrow hereto attached and made a part hereof.

RICHARDS & HAGA,
MARTIN & MARTIN,
Attorneys for American Surety Company of New York.

Residence: Boise, Idado.

[Endorsed]: Filed June 26, 1930. [51]

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[Title of Court and Cause.]

AFFIDAVIT OF McKEEN F. MORROW.

State of Idaho,
County of Ada,—ss.

McKeen F. Morrow, being first duly sworn, upon his oath, deposes and says: That he is a [54]

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member of the firm of Richards & Haga, attorneys for American Surety Company of New York, and makes this affidavit on behalf of said American Surety Company of New York for the reason that all of its officers reside outside the State of Idaho, where attorneys for said party reside, and that he has personal knowledge of the facts herein set forth; that the judgment entered herein in favor of plaintiffs and against American Surety Company of New York, a corporation, surety, was made and entered without notice to said American Surety Company of New York or any of its officers or agents; that after the entry of said judgment and on or about

the 24th day of June, 1930, the said plaintiffs, through their attorneys, caused execution to issue from the above-entitled court upon said judgment and thereupon delivered said execution to the sheriff of Ada County, together with a written demand addressed to the treasurer of the State of Idaho for delivery of certain United States Liberty Bonds held by said state treasurer pursuant to Section 5104, Compiled Statutes of Idaho, sufficient to satisfy said judgment. That thereupon the said sheriff of Ada County served said writ of execution upon Byron Defenbach, Treasurer of the State of Idaho, on said 24th day of June, 1930, and presented a written demand for delivery of bonds deposited with said state treasurer by the said American Surety Company of New York sufficient in amount to satisfy said judgment, and thereupon the said Byron Defenbach, Treasurer of the State of Idaho, delivered to the said sheriff of Ada County certain

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registered United States Liberty [55] Bonds payable to the Treasurer of the State of Idaho, bearing four and one-quarter per cent interest, maturing 1933–1938, numbered as follows: Bonds 46289 and 46290, $10,000 each; bonds 559144, 559145 and 559146, $1,000 each, together with the unmatured coupons attached thereto. That the said sheriff of Ada County, Idaho, at the request of attorneys for plaintiffs thereupon issued and posted a certain notice of sale to the effect that said bonds would be sold at public auction to the highest bidder for cash on Monday, June 30, 1930, at 10:00

o'clock A. M. That the levy of said execution and the taking possession of said bonds and the advertising of said bonds for *said as* aforesaid is in violation of the provisions of Section 5104, Idaho Compiled Statutes, 1919.

McKEEN F. MORROW.

(Duly verified.) [56]

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MINUTES OF THE PROCEEDINGS OF THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR ADA COUNTY, ON AUGUST 12, 1930—JOURNAL Y, PAGE 155.

No. 11,860.

VIVIAN F. BALDWIN,

Plaintiff,

vs.

SINGER SEWING MACHINE COMPANY et al.,

Defendants.

In this cause the motion to declare the judgment void and to set the same aside having been heretofore taken under advisement, the court at this [58]

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time rendered its decision and granted said motion and ordered counsel for the Surety Company to prepare the proper order to this effect to which ruling the plaintiffs duly excepted, which exception was allowed by the Court.

CHARLES F. KOELSCH,

District Judge. [59]

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[Title of Court and Cause.]

NOTICE OF APPEAL.

To Singer Sewing Machine Company, a Corpora-

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tion, and Messrs. Martin & Martin [61] and H. B. Walker, Its Attorneys, Ed Anderson and Messrs. Martin & Martin and H. B. Walker, His Attorneys, American Surety Company of New York and Messrs. Richards & Haga and Martin & Martin, Its Attorneys, and to Stephen Utter, Clerk of the Above-entitled District Court:

YOU AND EACH OF YOU will please take notice that the plaintiffs hereby appeal to the Supreme Court of the State of Idaho from that certain order, made and entered in the above-entitled action on the 12th day of August, 1930, which said order vacates and holds as void that certain judgment entered in favor of plaintiffs and against the American Surety Company of New York on the 23d day of June, 1930, for the sum of $22,357.21, together with interest.

Dated this 19th day of August, 1930.

JAMES F. AILSHIE, Jr.,
J. R. SMEAD,
Attorneys for Plaintiffs.

Service admitted this 19th day of August, 1930.

MARTIN & MARTIN,

Attorneys for Singer Sewing Machine Company.

RICHARDS & HAGA,

Attorneys for American Surety Company of New York.

H. B. WALKER,

Attorney for Ed. Anderson.

[Endorsed]: Filed August 19, 1930. [62]

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[Title of Court and Cause.]

CERTIFICATE.

We, the undersigned, James F. Ailshie, Jr., and J. R. Smead, attorneys for Vivian F. Baldwin and

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[65] E. R. Baldwin; Martin & Martin, attorneys for Singer Sewing Machine Company, a corporation; H. B. Walker, attorney for Ed. Anderson; and Richards & Haga and Martin & Martin, attorneys for American Surety Company of New York, a corporation, do hereby certify the foregoing transcript of pages numbered from 5 to 38, inclusive, to be full, true and correct copies of the pleadings and proceedings in the above-entitled cause, and that the same constitute the transcript of the record herein upon appeal to the Supreme Court of the State of Idaho, and that we have compared the foregoing transcript with the original papers in the above-entitled action of Vivian F. Baldwin and E. R. Baldwin, plaintiffs, vs. Ed. Anderson, defendant, and American Surety Company of New York,

a corporation, surety, in the district court of the third judicial district of the State of Idaho, in and for the county of Ada, and on file of record in the office of the clerk of said district court, and certify that the foregoing transcript contains true and correct copies of the following papers and matters, to wit:

1. The following from the records and files of Baldwin et al. vs. Singer Sewing Machine Company and Ed. Anderson:

Judgment in favor of plaintiffs entered May 31, 1928.

Notice of appeal of the defendants, dated August 27, 1928.

Undertaking on said appeal, filed August 29, 1928.

Supersedeas bond on said appeal, filed August 29, 1928. [66]

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Order directing reporter to prepare a transcript of the evidence upon the trial of said cause, dated August 29, 1928.

Praecipe to Clerk of the defendants in said case.

Notice of appeal by defendant Anderson from order denying new trial.

Notice of appeal by defendant Singer Sewing Machine Company from order denying new trial.

Remittitur of the Supreme Court of Idaho.

Judgment entered May 24, 1930, pursuant to said remittitur.

2. And the following from the records and files herein:

Judgment against the American Surety Company, dated June 23, 1930.

Motion, dated June 26, 1930, to vacate and set aside as void said judgment against the American Surety Company, together with supporting affidavit.

Stipulation and order approving the same, filed August 9, 1930.

Order of District Court granting said motion to vacate judgment against the American Surety Company.

Notice of appeal of Vivian F. Baldwin and E. R. Baldwin from said order.

Undertaking on said appeal.

Minutes of the court of August 12, 1930.

Certificate of trial Judge of papers and files used upon the hearing and decision of said motion.

The praecipe.

We further certify that an undertaking on appeal in due form was filed in said action on the 19th day of August, 1930. [67]

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FURTHER, It is stipulated that the foregoing transcript shall be used in lieu of and with the same force and effect as a Clerk's transcript of the foregoing papers and matters, and that this certificate shall in all respects have the same force and effect of a certificate of the Clerk of the district court of the third judicial district of the State of Idaho, in and for the county of Ada, duly executed.

Dated this 5th day of September, 1930.

JAMES F. AILSHIE, Jr.,
J. R. SMEAD,
Attorneys for Plaintiffs.
H. B. WALKER,
Attorney for Defendant Ed. Anderson.
MARTIN & MARTIN,
Attorneys for Singer Sewing Machine Company, a Corporation.
RICHARDS & HAGA,
MARTIN & MARTIN,
Attorneys for American Surety Company of New York, a Corporation.

Service of the foregoing transcript is hereby admitted this 11th day of September, 1930.

(Signed) H. B. WALKER,
Attorney for Ed. Anderson.
(Signed) MARTIN & MARTIN,
Attorneys for Singer Sewing Machine Company.
(Signed) RICHARDS & HAGA,
(Signed) MARTIN & MARTIN,
Attorneys for American Surety Company of New York. [68]

In the Supreme Court of the State of Idaho.

No. 5653.

Boise, Jan. Term, 1931.

Filed May 2, 1931. Clay Koelsch, Clerk.

VIVIAN F. BALDWIN and E. R. BALDWIN,
Appellants,

vs.

ED ANDERSON and AMERICAN SURETY COMPANY OF NEW YORK, a Corporation,
Respondents.

OPINION OF SUPREME COURT (McNAUGHTON, J.).

Appeal from the District Court of the Third Judicial District, for Ada County. Hon. Charles F. Koelsch, Judge.

Appeal from an order setting aside judgment on supersedeas undertaking. Reversed.

JAMES F. AILSHIE, Jr., and J. R. SMEAD, for Appellants.

MARTIN & MARTIN, H. B. WALKER, and RICHARDS & HAGA, for Respondents.

McNAUGHTON, J.—This is an appeal from an order setting aside as void a judgment against a bondsman. The judgment against the respondent company was entered pursuant to C. S., sec. 7155, on an undertaking on appeal.

Appellants Baldwin, as plaintiffs, had procured a judgment against Ed. Anderson and the Singer

Sewing Machine Company as defendants in the District Court. The defendants jointly gave notice of appeal and appealed the case to the Supreme Court. On appeal the following undertaking was executed and filed:

"Whereas the defendant, Singer Sewing Machine Company, a corporation, in the above-entitled action has appealed to the Supreme Court of the State of Idaho from the judgment made and entered against it in the above-entitled action and in the above-entitled court in favor of the plaintiffs in said action on the 31st day of May, 1928, for the sum of Nineteen Thousand Five Hundred ($19,500.00) Dollars and for Seventy-three and 70–100 ($73.70) Dollars costs in said suit, making a total of Nineteen Thousand Five Hundred Seventy-three and 70–100 ($19,573.70) Dollars, and from the whole of said judgment;

"AND WHEREAS, the said appellant, Singer Sewing Machine Company, a corporation, is desirous of staying the execution of said judgment so appealed from;

"NOW THEREFORE, the undersigned American Surety Company, a corporation authorized to, and doing business in the State of Idaho, in consideration of the premises and of such appeal on the part of said appellant, Singer Sewing Machine Company, a corporation, does hereby acknowledge itself firmly bound in the sum of twenty-five Thousand ($25,000.00) Dollars, gold coin of the United States, that if the said judgment appealed from,

or any part thereof, be affirmed, or the appeal dismissed, the appellant will pay in gold coin of the United States of [70] America, the amount directed to be paid as to which said judgment shall be affirmed, if affirmed only in part, and all damages and costs which may be awarded against the appellant upon the appeal, and that if the said appellant does not make such payment within thirty days from the filing of the remittitur from the Supreme Court in the court from which the appeal is taken, judgment may be entered on motion of the respondents in their favor and against the undersigned surety for the said sum of Nineteen Thousand Five Hundred Seventy-three and 70–100 ($19,573.70) Dollars, together with the interest that may be due thereon and the damages and costs which may be awarded against the said appellant, Singer Sewing Machine Company, upon the appeal.

"IN WITNESS WHEREOF, the said American Surety Company, has caused its name and seal to be attached hereto by its proper officers and agents at Boise, Idaho, this 28th day of August, 1928.

"AMERICAN SURETY COMPANY OF NEW YORK.

"By HOWARD E. STEIN,

"Attorney-in-fact."

In the Supreme Court the judgment was affirmed as to Anderson but reversed as to Singer Sewing Machine Company. The remittitur was filed in the District Court on May 22, 1930. Pursuant to the

remittitur, on May 24th the District Court entered judgment dismissing the case as to Singer Sewing Machine Company. On June 23d the appellants Baldwin moved for judgment against the American Surety Company on the undertaking, which they claimed stayed execution on the whole judgment. This motion was granted and judgment accordingly was entered. Thereafter the American Surety Company moved to vacate and set aside said judgment on the grounds that it was, (1) void, (2) contrary to good conscience, and (3) was entered without notice to the American Surety Company. The motion was granted and an order entered whereby said judgment was declared null and void, and was annulled, vacated and set aside. From this order the present appeal was taken.

Many assignments of error are made, but so far as this appeal is concerned we deem it necessary to consider only those which challenge the ruling of the lower court to the effect that the judgment against the Surety Company on the undertaking was void.

The briefs on both sides very ably and in great detail discuss the legal effect of the different provisions of the bond in light of the nature of the appeal. The appellants claim that the undertaking by its terms superseded and stayed execution upon the whole judgment and is conditioned to pay any part thereof affirmed by the Supreme Court, and that such being the conditions of the bond its recital of introductory facts is misleading and not controlling. On the other hand the respondents devote the major portion of their brief to the contention

that the recital of facts in the introductory part of the undertaking governs the condition and obligation of the undertaking; that such recitals limit the stay of execution to the Singer Sewing Machine Company only, and the obligation is to pay only such judgment in whole or in part as might be affirmed against the Singer Sewing Machine Company.

We disclaim any intention or right to construe the legal effect of the undertaking in question further than to examine it in aid of determining the sole question of the court's jurisdiction to hear and determine the motion for judgment thereon.

The surety company did not claim error, and appeal. It did not claim inadvertence or mistake. It challenged the court's jurisdiction and moved to set aside the judgment as void. The whole question here is a question of jurisdiction. Nothing further. Nothing else. [71]

If a court has jurisdiction of the parties, jurisdiction of the subject matter and jurisdiction of an issue of law or fact presented, then its judgment upon that issue is not void whether erroneous or not. Such judgments in the absence of mistake or, in a proper case, motion for new trial, may be corrected only by appeal. Bunnell and Eno etc. Co. vs. Curtis, 5 Ida. 652, 51 Pac. 767; Taylor vs. Hulett, 15 Ida. 265, 97 Pac. 37; Wyllie vs. Kent, 28 Ida. 16, 152 Pac. 194; United States Nat. Bank vs. Eldredge, 49 Ida. 363, 288 Pac. 416.

Regarding notice: Where a supersedeas undertaking for stay of execution is filed pursuant to C. S., sec. 7155, it is held the surety becomes a

party to the action and if the judgment stayed by the undertaking is affirmed in whole or in part and remains unsatisfied for thirty days the judgment creditor may move in the action for judgment on the undertaking against the surety, and it is unnecessary to give the Surety Company notice of such motion. Empire State-Idaho Min. & Developing Co. vs. Hanley, 136 Fed. 99; U. S. Fidelity & G. Co. vs. Ft. Misery Highway Dist., 22 Fed. (2d) 369; Gray vs. Cotton, (Cal.) 162 Pac. 1019; Portland Trust Co. vs. Havely, (Ore.) 61 Pac. 346.

It is claimed by respondent that these authorities are not in point because the legal effect of an undertaking is the same as that of a bond in that the party executing the undertaking is simply surety for a principal; that in this case the introductory recitals of the undertaking disclose that the principal is the Singer Sewing Machine Company, and that upon the action being dismissed as to it such dismissal was also a dismissal as to the Surety Company. We cannot accept this view. The undertaking is a complete independent contract. The obligation of its maker is not collateral or secondary. Moffat vs. Greenawalt, (Cal.) 27 Pac. 296. Its obligations are to be determined from the instrument itself. If the contract stayed the whole judgment and promised in consideration thereof to pay any part thereof affirmed in the Supreme Court which remained unpaid thirty days after the remittitur was filed, it remains a party to the action and liable until that obligation is satisfied.

As to jurisdiction of the subject matter of the motion: It is urgently claimed by the respondent that the District Court was without jurisdiction to render the judgment on the undertaking which was entered. As we understand respondents' argument on this phase it is to the effect that it becomes necessary for this court to construe the bond to determine whether the District Court had jurisdiction to enter the judgment. Quoting from Freeman on Judgments, 5th Ed, vol. 1, pp. 444, 445, respondents' argument proceeds:

> " 'Aside from these cases in which the purported judgment is in reality no judgment, and considering those cases in which there has been an attempt at judicial action by a competent court, a judgment is not regarded as void unless there was a total lack of jurisdiction to render it. There are in general three jurisdictional elements in every valid judgment namely, jurisdiction of the subject matter, jurisdiction of the person, *and the power or authority to render the particular judgment.* For the absence of any one of these elements, when properly apparent, the judgment may be vacated at any time, whether before or after the term or the time limited by statute for motions on statutory grounds, either on motion or of its own volition without suggestion.' "

The phrase in italics may be misleading. This matter is [72] somewhat clarified by the quotation from Gile vs. Wood, 32 Ida. 752, 188 Pac. 36, as follows:

> "In addition to the jurisdiction of the parties and the subject matter, it is necessary to the validity of a judgment that the Court should have jurisdiction of the question which its judgment assumes to decide, or of the particular remedy or relief which it assumes to grant."

In the Gile case an action was brought for the foreclosure of a mortgage. No allegation of indebtedness of defendant to plaintiff was contained in the complaint or claim made for a deficiency judgment. Nevertheless in the decree deficiency judgment was given. On motion, this provision of the decree was stricken as void for want of jurisdiction to award deficiency judgment. Had a question of right to deficiency judgment been presented to the court, and had the right to such relief been dependent upon a judicial construction, a very different question would have arisen on the motion to declare void. In such case clearly there might have been error, but the judgment would not have been void. The vice in Gile vs. Wood which rendered part of the judgment void was that the court adjudged there was a right to deficiency judgment though no such question was submitted to the court. The court's jurisdiction was not dependent upon a proper construction of any document. It was dependent upon the question of whether right to deficiency judgment was submitted to the court. That issue not being presented the judgment upon it was held to be void for want of jurisdiction to adjudge it, and it was set aside on motion. See, also, Maloney vs. Zipf, 41 Ida. 52, 237 Pac. 632.

In the case at bar the only question presented to the court was as to right to judgment on the bond which was presented to the court by appellants in the manner provided by statute for the submission of that issue. This challenged judicable inquiry. The question or issue presented was, did the Surety Company, in its undertaking, become a party liable for every part of the judgment appealed from which might be affirmed by the Supreme Court, or did it stipulate only as to such judgment or part thereof as might be affirmed against the Singer Sewing Machine Company? To answer this question the court must look to the bond. The issue required a construction of the bond as a whole. The trial court had jurisdiction of this question. It construed the bond in favor of appellants and against the Surety Company. It was not only in that court's power, but it was its duty, to decide the question submitted. In re Clerf, (Wn.) 104 Pac. 622; Windfrey vs. Benton, (Okla.) 106 Pac. 853. Whether it decided right or wrong its decision was a judgment which could be reviewed for error, if there was error, only by this court on appeal. Bunnell and Eno etc. Co. vs. Curtis, *supra;* Taylor vs. Hulett, *supra;* Wyllie vs. Kent, *supra;* United States Nat. Bank vs. Eldredge, *supra.* On appeal the question could be re-examined. The undertaking cannot be examined and its legal effect as to this issue be determined by us on this appeal. We may consider it only in so far as to determine whether its wording is such that it afforded color of legal right in appellants to judgment. That is to say, whether appellants' motion presented a legit-

inate question and was not an imposition or fraud upon the court. We think, regardless of what our construction of the bond might be, it cannot be said appellants held no right to submit the question. Nor can it be said that such submission was a fraud upon the court and on that ground its judgment was void.

We find the trial court, upon the motion for judgment on the bond, had jurisdiction of the parties and jurisdiction of the subject matter; that an issue was presented and it had jurisdiction [73] to construe the undertaking and decide the issue which its judgment assumes to decide. It follows the judgment was not void, even if erroneous in the construction, and that the trial court committed error in annulling and vacating it as void.

The order vacating the judgment is reversed, with costs to appellants.

Lee, C. J., Givens and Varian, JJ., concur. [74]

May 2, 1931.

BALDWIN

vs.

ANDERSON et al.

DISSENTING OPINION OF SUPREME COURT (BUDGE, J.).

BUDGE, J., Dissenting.—In extension of the facts stated in the majority opinion, it appears that Vivian F. Baldwin and her husband instituted an action in the District Court against the Singer Sewing Machine Company, a corporation, and one

Anderson, to recover damages for personal injuries alleged to have been sustained by Vivian F. Baldwin as a result of being struck by an automobile driven by Anderson. The complaint alleged that at the time of the accident Anderson was an agent of the Sewing Machine Company acting within the scope of his employment. From a judgment against the Sewing Machine Company and Anderson an appeal was taken to this court, resulting in a reversal of the judgment against the Sewing Machine Company and affirmance of the judgment against Anderson.

To stay execution of the judgment of the trial court against the Sewing Machine Company pending appeal, the American Surety Company executed a supersedeas bond, in terms as set out in the majority opinion. Upon the going down of the remittitur of this court, filed in the office of the Clerk of the District Court May 22, 1930, and in compliance therewith, the trial court "ordered, adjudged and decreed . . . . that the plaintiffs Vivian F. Baldwin and E. R. Baldwin take nothing from defendant Singer Sewing Machine Company, and that the said cause of action be, and the same is hereby dismissed as to the defendant Singer Sewing Machine Company, a corporation."

On June 23, 1930, upon *ex parte* motion, appellants here, before a Judge other than the other who tried the original action, procured a judgment to be entered against the American Surety Company on the supersedeas bond. On June 26, 1930, upon notice and motion, respondents moved the court to set aside and vacate the judgment theretofore en-

tered against the American Surety Company, upon three grounds, (1) that the judgment was void; (2) that it was contrary to good conscience; and (3) that it was entered without notice to the American Surety Company. After a hearing and due consideration of the motion, and affidavit filed therewith, the court made the following order:

> "Now, therefore, it is hereby ordered, adjudged and decreed, that that certain judgment made and entered in the above entitled cause on June 23, 1930, against the American Surety Company of New York, a corporation, in the sum of $22,357.21, together with interest thereon at the rate of seven per cent per annum from date until paid, be, and the same hereby is, vacated, annulled and set aside, and the same is hereby declared to be null and void, and the execution issued pursuant thereto be, and the same hereby is quashed and recalled."

This appeal is taken from the above order.

In the majority opinion it is held that the lower court had jurisdiction to enter the judgment upon the supersedeas bond and that its action in this regard is not subject to be reviewed by notice and motion, but on appeal. This position to my mind is not tenable. This court has now before it the identical record it would have, had an appeal been taken. If the judgment entered upon the supersedeas bond is void upon its face and it so appears from the record, it was subject to attack upon notice and motion, or it was within the power of the trial court, upon its own motion, independent of any statute,

to vacate the judgment. Gile vs. Wood, 32 Ida. 752, 188 Pac. 36; Nixon vs. Tongren, 33 Ida. 287, 193 Pac. 731; Miller vs. Prout, 33 Ida. 709, 197 Pac. 1023; 15 Cal. Jur., [75] pp. 52–53, sec. 141; Dubois vs. Clark, (Colo.) 55 Pac. 750. Even though the judgment was not void upon the face of the record, it was nevertheless subject to be vacated upon motion made within a reasonable time by a showing of lack of jurisdiction of the court to enter it. Armitage vs. Horshoe Bend Co., 34 Ida. 179, 204 Pac. 1073; Nixon vs. Tongren, *supra;* Norton vs. Atchison, T. & S. F. R. Co., (Cal.) 30 Pac. 585, 32 Pac. 452, 33 A. S. R. 198; 14 Cal. Jur. pp. 1024 et seq.

The supersedeas bond upon its face and throughout its contents shows clearly that it was given to stay execution upon the judgment and the whole thereof entered against the Sewing Machine Company. Anderson's name nowhere appears in the bond, and in order to uphold the judgment entered upon the supersedeas bond it becomes necessary for the court to read into the bond that it was given to stay execution of the judgment against Anderson as well as against the Sewing Machine Company. This the court has no authority to do.

It is fallacious to contend that under a judgment joint in form but in fact and in law joint and several against two or more defendants, a stay of execution on such judgment in favor of one of the defendants pending an appeal is a stay of execution as against all of the defendants. It is likewise illogical to contend that a supersedeas bond stays proceedings in favor of a person not named in the bond.

Appellants were in a position at any time from the entry of the original judgment against the Sewing Machine Company and Anderson to execute upon the judgment against Anderson, the latter having furnished no supersedeas bond. C. S., secs. 7155, 6902 (amended, Sess. Laws 1929, p. 70); 23 C. J., p. 533; 3 C. J., p. 1324, sec. 1451; 2 Cal. Jur., p. 472, sec. 222; Drabant vs. Cure, (Pa.) 124 Atl. 340; State vs. Beveridge, (Or.) 218 Pac. 1112; Bergevin vs. Wood, (Cal.) 105 Pac. 935; Ex parte French, 100 U. S. 1, 25 L. Ed. 529.

The supersedeas bond is the foundation of the judgment obtained thereon and must be interpreted from its four corners. The surety is entitled to have his bond strictly construed. His liability cannot be extended by implication. He has a right to stand upon the exact words of his contract, and his liability is limited to the language of his bond. City of Pocatello vs. Fargo, 41 Ida. 432, 242 Pac. 297; Jackson vs. Barrett, 12 Ida. 465, 86 Pac. 270. With this principle in mind the bond should be examined for the purpose of determining whether the court had jurisdiction to enter the particular judgment. The court must not only have jurisdiction of the person and the subject matter but power and authority to render the particular judgment. In the opening of the bond we find this language:

> "Whereas, the defendant Singer Sewing Machine Company, a corporation, in the above-entitled action has appealed to the Supreme Court of the State of Idaho from the judgment made and entered against it in the above-en-

titled action in the above-entitled court in favor of the plaintiffs in said action . . . . and from the whole of said judgment."

The whole of said judgment against the Singer Sewing Machine Company, not the whole of the judgment against Anderson. Anderson is an entire stranger to the American Surety Company. That he was never thought of when the supersedeas bond was given is a fact apparent from the entire record. To read his name into the bond or to create a liability against the American Surety Company by reason of the fact that the judgment was rendered against Anderson and the Singer Sewing Machine Company is to do violence to the language of the bond. No language could be plainer to my mind, from a reading of the bond, [76] than that it was the intention of the American Surety Company to furnish a supersedeas bond for the Singer Sewing Machine Company alone. Had it intended to furnish a bond for both the Sewing Machine Company and Anderson, language would have been used to that effect. It names the Singer Sewing Machine Company in its bond, it refers to the judgment entered against the Sewing Machine Company in its bond, and the bond is given to stay execution against the whole of the judgment entered against the Sewing Machine Company. This is further emphasized by the next paragraph of the bond, which is as follows:

"And whereas, the said appellant, Singer Sewing Machine Company, a corporation, is

desirous of staying the execution of said judgment so appealed from."

What judgment? The judgment appealed from by the Singer Sewing Machine Company. We must look to the whole instrument to gather the intention of the parties, the preamble as well as the condition of the bond, and particularly is this true where there is doubt. The condition of the bond is even more explicit than the preamble in limiting liability on the bond to a stay of execution against the Singer Sewing Machine Company. It is as follows:

"Now, therefore, the undersigned American Surety Company, a corporation authorized to, and doing business in the State of Idaho, in consideration of the premises and of such appeal on the part of said appellant, Singer Sewing Machine Company, a corporation, does hereby acknowledge itself firmly bound in the sum of Twenty-five Thousand ($25,000.00) Dollars, gold coin of the United States, that if the said judgment appealed from, or any part thereof, be affirmed, or the appeal dismissed, the appellant will pay in gold coin of the United States of America, the amount directed to be paid as to which said judgment shall be affirmed, if affirmed only in part, and all damages and costs which may be awarded against the appellant upon the appeal, and that if the said appellant does not make such payment within thirty days from the filing of the remittitur from the Supreme Court in the court from

which the appeal is taken, judgment may be entered on motion of respondents in their favor and against the undersigned surety for the sum of Nineteen Thousand Five Hundred Seventy-three and 70–100 ($19,573.70) Dollars, together with the interest that may be due thereon and the damages and costs which may be awarded against the said appellant, Singer Sewing Machine Company, upon the appeal."

It affirmatively appears from the condition of the bond as above set out that the bond was given solely for the purpose of staying execution against the Singer Sewing Machine Company, with the amount of the judgment payable only in the event the judgment against the Singer Sewing Machine Company or any part thereof be affirmed. If the judgment against the Sewing Machine Company had been affirmed in part the bond would be answerable to the extent of the affirmance.

The bond is unambiguous and clearly determines the liability of the surety. There is no room for construction and no justification for holding that the bond will be considered no further than to examine it in aid of determining the sole question of the trial court's jurisdiction to enter judgment on the bond. Even under such a technical view there is ample justification for holding that the judgment entered on the supersedeas bond was void. But the majority opinion actually construes the bond and its legal effect and holds that because the judgment was affirmed as to Anderson, it was affirmed in part and the surety is liable.

To recapitulate, we have this situation: The District Court had no jurisdiction over the Singer Sewing Machine Company after [77] the judgment against it had been set aside in this court. The rule is that when an order is entered in an appellate court reversing a judgment it is forthwith vacated and no longer remains in existence. 2 R. C. L., p. 270, sec. 222. When the judgment was set aside as to the Sewing Machine Company, the American Surety Company could not be liable because its principal had been dismissed. 1 Freeman on Judgments, 5th ed., p. 1026, sec. 466; Howell vs. Alma Milling Co., 36 Neb. 80, 38 A. S. R. 694, notes, pp. 702–712; First Nat. Bank vs. Rogers, 13 Minn. 407, 97 Am. Dec. 239; Burnham vs. Edwards, (Okl.) 257 Pac. 788. The bond upon its face, in unmistakable language, shows that it was given to stay execution against the Singer Sewing Machine Company and for no one else, and the court therefore had no authority to construe the bond to include the judgment against Anderson. The judgment against the Surety Company on the supersedeas bond was therefore void when entered, and was subject to attack by motion to, and was properly, set aside.

No other result can follow from the holding of the majority than a miscarriage of justice, and it is repugnant to both the state and federal Constitutions in that the surety company is deprived of its property without due process of law. [78]

[Title of Court and Cause—No. 5653.]

CERTIFICATE OF CLERK OF SUPREME COURT TO OPINION.

I, Clay Koelsch, Clerk of the Supreme Court of the State of Idaho, do hereby certify that the above and foregoing is a true and correct copy of the original opinion filed in the above-entitled cause on the second day of May, 1931, and now on file in my office.

WITNESS my hand and the seal of the court this seventh day of July, 1931.

[Seal] CLAY KOELSCH,
Clerk.
By Edith J. Hearne,
Deputy. [79]

11,860. Filed June 3d 1931. Stephen Utter, Clerk. By Otto F. Peterson, Deputy.

[Title of Court and Cause—No. 5653.]

This cause having been heretofore heard and taken under advisement by the Court, and the Court having fully considered the same, on this day the decision of the Court is delivered by Justice McNaughton, to the effect that the order of the District Court of the Third Judicial District for Ada County vacating the judgment be and the same is hereby reversed, with costs to appellants, in the sum of $96.

I, Clay Koelsch, Clerk of the Supreme Court of the State of Idaho, do hereby certify that the

above and foregoing is a true and correct copy of the original judgment entered in the above-entitled cause on the second day of May, 1931, and now of record in my office.

WITNESS my hand and the seal of the court this seventh day of July, 1931.

[Seal] CLAY KOELSCH,
Clerk.
By Edith J. Hearne,
Deputy.

CERTIFICATE.

State of Idaho,
County of Ada,—ss.

I, Stephen Utter, Clerk of the District Court of the Third Judicial District of the State of Idaho, in and for the county of Ada, do hereby certify that the foregoing is a true and correct copy of the original remittitur from the Supreme Court of Idaho, filed in this court on June 3d, 1931, filed in the above-entitled action and remaining now on file in my office at Boise City, Ada County, Idaho.

Given under my hand and the seal of said court, at office in Boise City, Ada County, Idaho, this 21st day of July, 1931.

[Seal] STEPHEN UTTER,
Clerk.
By Otto F. Peterson,
Deputy. [80]

DEFENDANTS' SHOWING No. 4.

No. 11,860.

Filed Jun. 8, 1931. Stephen Utter, Clerk. By Thos. E. Powell, Deputy.

U. S. District Court, District of Idaho. Filed Jul. 22, 1931. W. D. McReynolds, Clerk. By ————, Deputy.

In the District Court of the Third Judicial District of the State of Idaho, in and for the County of Ada.

VIVIAN F. BALDWIN and E. R. BALDWIN,
Plaintiffs,

vs.

ED ANDERSON and AMERICAN SURETY COMPANY OF NEW YORK, a Corporation,
Defendants.

NOTICE OF MOTION.

To the Above-named Plaintiffs and to James F. Ailshie, Jr., and J. R. Smead, Their Attorneys:

YOU, AND EACH OF YOU, ARE HEREBY NOTIFIED, That on the 20th day of June, 1931, at 10 o'clock A. M. of said day, or as soon thereafter as counsel can be heard, at the courtroom of the above-entitled court, at Boise, Idaho, the above-named defendant, American Surety Company of New York, will, by its counsel, move the Court to

correct and amend that certain judgment against said American Surety Company of New York, made and entered on the 23d day of June, 1930, and when so amended to vacate and set aside said judgment upon the grounds and in accordance with the motion filed herewith, a copy of which is herewith served upon you.

Said motion is based upon the records and files in this action, the private files of the Judge of this court who made said judgment at Chambers, the minutes and proceedings of the above-entitled court, the exhibits attached to said motion and made a part thereof, being the affidavits of Frank Martin, McKeen F. Morrow, Thos. L. Powell, A. J. Gamble, Howard E. Stein and B. Clyde Eagleson, and the certified copy of minutes attached to the last-mentioned affidavit as an exhibit.

Dated, June 18th, 1931.

RICHARDS & HAGA,
MARTIN & MARTIN,
Attorneys for American Surety Company of New York, Surety.

Service of the foregoing notice of motion and of the motion therein referred to, and the exhibits thereto attached, as listed above, and receipt of a copy of each of said papers is hereby admitted this 18th day of June, 1931.

JAMES F. AILSHIE, Jr.,
J. R. SMEAD,
Attorneys for Plaintiffs. [81]

Filed June 18, 1931. Stephen Utter, Clerk. By Thos. E. Powell, Deputy.

[Title of Court and Cause—No. 11,860.]

MOTION TO AMEND JUDGMENT.

Comes now the American Surety Company of New York, a New York corporation, and moves this Honorable Court as follows, to wit:

I.

To correct and amend that certain judgment against said American Surety Company of New York, purporting to have been made and entered in the above-entitled cause by the above-entitled court on the 23d day of June, 1930, but in truth and in fact, made at Chambers by the Judge of said court, in the matters hereinafter stated, to wit:

(a) Strike from said judgment the following words, to wit:

> "and the plaintiffs having moved the court for a judgment against the said American Surety Company of New York, a corporation, and the court being fully advised in the premises:"

for the reason that said statement is misleading and false and not in accordance with the facts, as no motion was made by or on behalf of the plaintiffs to the above-entitled court in said matter either orally or in writing and no motion was made or [82] filed in or with said court by the plaintiffs or their counsel in connection with said matter.

That said judgment was prepared by plaintiffs'

counsel and presented to the Judge of said above-entitled court at Chambers without motion and the Judge of said court signed said judgment at Chambers upon request of the plaintiffs' said attorneys inadvertently and without noticing or having his attention called to said above false and misleading statements.

(b) To strike from the last line in said judgment the following words, to wit:

"in open court"

and insert in lieu thereof the words—"at chambers" —for the reasons given in paragraph (a) above.

II.

That when said judgment is so amended and corrected as above set forth so that it will show the truth in regard to the manner of its making and entry that the same be vacated and set aside upon the following grounds and for the following reasons, to wit:

(a) That the Judge of said court had no jurisdiction to make and enter said judgment at Chambers, it being a matter requiring judicial consideration and one that could only be heard, and judgment made and entered by the court and not by the Judge of said court at Chambers.

(b) That no notice of said Chambers proceeding was given to the American Surety Company as required by law.

That neither the American Surety Company and/or its attorneys had any notice or knowledge that said judgment was made and entered without motion

having been made therefor before the court and had no notice or knowledge that said judgment was made at Chambers by the Judge of said court and not [83] by the court. That the said American Surety Company of New York, and its attorneys believed and relied upon the truth of the statements contained in said judgment that the said motion for said judgment was made in court, and that the said judgment was made and entered in the court, and so relying upon said statements as true did not make an investigation of said matter and were thereby misled to their injury and were prevented thereby from including said matters in their motion previously made to vacate said judgment and the appeal from the order of this court vacating said judgment heretofore made in the Supreme Court of this state. That neither the American Surety Company of New York, or its said attorneys or either of them had any notice or knowledge that said statements in said judgment were false until after the decision of the Supreme Court in this matter on appeal from the former order of this court vacating said judgment of June 23d, 1930, and until some time about June 1, 1931.

This motion is based upon the records and files in this action, the private files of the Judge of this court who made said judgment at Chambers, the minutes and proceedings of the above-entitled court, the exhibits attached hereto and made a part hereof, and a statement of the Hon. Charles F. Koelsch, the Judge who made said judgment at

Chambers, to be taken on the hearing of this motion and made a part of said proceedings.

RICHARDS & HAGA,
MARTIN & MARTIN,

Attorneys for American Surety Company of New York, Surety. [84]

EXHIBIT "A."

In the District Court of the Third Judicial District of the State of Idaho, in and for the County of Ada.

VIVIAN F. BALDWIN and E. R. BALDWIN,
Plaintiffs,

vs.

ED. ANDERSON and THE AMERICAN SURETY COMPANY OF NEW YORK, a Corporation, Surety.

AFFIDAVIT OF FRANK MARTIN.

State of Idaho,
County of Ada,—ss.

Frank Martin, being first duly sworn, deposes and says:

That he is a member of the firm of Martin & Martin, attorneys at law of Boise, Idaho, and has been a member of such firm during all the times hereinafter mentioned in this affidavit.

That the firm of Martin & Martin were attorneys for and represented the defendant Singer Sewing Machine Company in the action of Vivian F. Baldwin and E. R. Baldwin vs. the Singer Sewing Ma-

chine Company, a corporation and Ed. Anderson, in that suit in the District Court of the Third Judicial District of the State of Idaho, in and for the County of Ada, and on the appeal of the same to the Supreme Court of the State of Idaho, mentioned and described in the judgment made in favor of the plaintiffs Vivian F. Baldwin and E. R. Baldwin and against the American Surety Company of New York, in said matter on the 23d day of June, 1930, by the Hon. Charles F. Koelsch, District Judge.

That the first information that this affiant or any member of the firm of Martin & Martin had that said judgment of June 23d, 1930, against the American Surety Company of New York had been made, or any proceeding therefor, was late on the afternoon [85] of June 24th, 1930, when Mr. McKeen F. Morrow of the firm of Richards & Haga, local attorneys of said American Surety Company of New York informed this affiant that James F. Ailshie, Jr., one of the attorneys for the plaintiffs, had informed him of the entry of said judgment and delivered to him a copy of the same.

That thereafter the firm of Martin & Martin assisted the local attorneys of the American Surety Company of New York, Messrs. Richards & Haga, in presenting a motion to the above-entitled court for the cancellation and vacation of said judgment so entered and also assisted said attorneys, Richards & Haga in the matter of the appeal of the plaintiffs herein from the order of the District Court vacating and setting aside the said judgment so entered against the American Surety Company of New York.

That at all times this affiant and the firm of Martin & Martin in assisting in said matter believed and relied upon the statements made in the said judgment so entered against the American Surety Company of New York as hereinabove stated, that the same was presented to the above-entitled court by motion and that said proceedings were had and said judgement made and entered in open court, and so relying upon said statements in said judgment as being true, made no investigation of said matter. That this affiant and the members of the firm of Martin & Martin had no notice of any matter and nothing was called to their attention which in any way caused them to suspicion or doubt that said statements in said judgment were true and as therein contained, and at all times in working on said matter assisting the said local attorneys of said American Surety Company of New York, and being in close touch with the said attorneys, this affiant knows that in all of said work the said firm of Richards & Haga, local attorneys for the American Surety Company, also fully [86] relied upon, and their actions were governed by such reliance upon the truth of the said statements in said judgment.

That so relying upon the truth of said statements contained in said judgment, the said American Surety Company of New York and the said attorneys representing it in said matters as hereinabove stated, were misled and prevented from presenting said matter on the motion heretofore made and herein referred to causing said judgment to be

acated and set aside and on the appeal therefrom o the Supreme Court of the State of Idaho.

That in working upon a petition for rehearing after the Supreme Court of this state had rendered its decision on the appeal of the plaintiffs from the order vacating said judgment, on or about May 20th, 1931, and noticing in said decision that the Court emphasised the statement in the said judgment that the same had been entered on motion of the plaintiffs to the District Court, this affiant for that reason desired to see the contents of said motion, and caused Frank Martin, Jr., a member of the firm of Martin & Martin, to go to the office of the Clerk of said District Court and examine the files, directing him to secure the contents of such motion. That on the return of said Frank Martin, Jr., from the office of the Clerk of said court, he informed this affiant that the files did not contain any such motion and that the Register of Actions in said case contained no notice that such motion had been filed in said case. That within a day or so after receiving this information affiant communicated the same to McKeen F. Morrow of the firm of Richards & Haga. This was the first notice or information of any kind that this affiant, or any member of the firm of Martin & Martin had that no motion for judgment in said matter had been made to the court and filed in said matter.

That thereafter and on or about the 4th day of June, 1931, this affiant, in company with McKeen F. Morrow of the firm of [87] Richards & Haga, called upon the Hon. Charles F. Koelsch, the Judge

of the above entitled court who had signed said judgment against the American Surety Company of New York hereinbefore referred to, and asked the said Judge about said motion and the manner of its making in court, whether or not such motion had been made orally in court or whether a written motion had been presented. Thereupon, the said Judge, Hon. Charles F. Koelsch, stated in substance to this affiant and the said McKeen F. Morrow, that said matter had not been done in court, that counsel for plaintiffs had presented the matter to him at chambers by presenting a prepared judgment against the said American Surety Company of New York, and requesting that he sign and enter the same. That said judgment had been so presented to him two or three days prior to June 23rd, 1930. That he then inquired of counsel for the plaintiffs who presented said judgment, James F. Ailshie, Jr., whether or not notice had been given to the American Surety Company of New *U*ork, and was informed by said attorney that no such notice had been given and that notice was unnecessary and at said time presented to said Judge authorities on said point. That on June 23rd, 1930, said counsel for plaintiffs again returned to the chambers of said Judge and again called the matter to his attention. That thereupon the said Judge signed said judgement and at the same time stated to said attorney for the plaintiffs that he would sign said judgment as he assumed the American Surety Company of New York would take appropriate steps to bring the matter before the

court for further consideration, further stating in substance that said entire proceeding was more or less a *pro forma* matter and that the entire matter was conducted at the chambers as a chambers proceedings. [88]

That this conversation with Judge Charles F. Koelsch was the first notice or information which this affiant or any member of the firm of Martin & Martin had that said proceedings was held at chambers and said judgement made and entered at chambers, and not in court as stated in said judgement, and in all proceedings taken before that time the said law firm of Richards & Haga and the said firm of Martin & Martin in their representation of the American Surety Company of New York, had fully relied upon the statements contained in said judgment that it was made and entered in open court and that the motion therefor was made to the court, and had believed such statements to be true.

That after this conversation with the said Hon. Charles F. Koelsch, this affiant made a careful examination of the proceedings of the court as shown by the District Court Journal kept by the Clerk of said court for the period from June 20th, 1930, to June 25th, 1930, both dates inclusive, and found thereon no reference whatever in said District Court Journal to the above entitled cause.

That this affidavit is made in support of the motion of the American Surety Company of New York to amend said judgment to show the true

facts in regard to its making and entry and to have the same vacated and set aside.

FRANK MARTIN.

Subscribed and sworn to before me this 17th day of June, 1931.

[Seal] C. S. HUNTER,
Notary Public.
Residence: Boise, Idaho. [89]

EXHIBIT "B."

In the District Court of the Third Judicial District of the State of Idaho, in and for Ada County.

VIVIAN F. BALDWIN and E. R. BALDWIN,
Plaintiffs,

vs.

ED ANDERSON and AMERICAN SURETY COMPANY OF NEW YORK,
Defendants.

AFFIDAVIT OF McKEEN F. MORROW.

State of Idaho,
County of Ada,—ss.

McKeen F. Morrow, being first duly sworn, upon his oath, deposes and says:

That he is a member of the firm of Richards & Haga, attorneys at law, Boise, Idaho, and said firm are local attorneys in Ada County and vicinity for American Surety Company of New York; that affiant and O. O. Haga and J. L. Eberle are author-

ized countersignors on surety bonds for said American Surety Company of New York.

That no notice whatever was given to said firm of Richards & Haga, or any member thereof, of the application of the above named plaintiffs for judgment against said American Surety Company of New York upon the supersedeas bond filed herein prior to the signing and entry of said judgment, and the first information affiant or said firm of Richards & Haga had regarding said judgment was on the 24th day of June, 1930, when one of the attorneys for plaintiffs informed affiant that judgment had been entered against the Surety Company on June 23d and gave affiant a copy of said judgment; that affiant thereafter made inquiries from the local agents of the American Surety Company, the Commissioner of Insurance of the State of Idaho, the District Office of the Surety [90] Company in Salt Lake City, Utah, and the New York office of said Company, and also examined the Court files; that there is no proof of notice of any kind in the court files and in answer to said inquiries, affiant was informed that no notice of application for judgment was given to any of the parties above named.

That the opinion of the Supreme Court on the appeal from order vacating judgment herein placed some emphasis upon plaintiffs' alleged motion for judgment on the undertaking herein and while the petition for rehearing was being prepared affiant discussed the necessity of a formal motion with associate counsel; that affiant knew that the record

on appeal from said order did not include any motion for judgment, but affiant relied upon the recital in said judgment that plaintiffs had moved the Court for judgment; that shortly before the 22nd day of May, 1931, affiant was informed by Mr. Frank Martin, of the firm of Martin and Martin, that the register of actions in this cause did not show the filing of any motion for judgment, and this was the first notice or information obtained by affiant or the firm of Richards & Haga that no motion for judgment in said matter had been filed by plaintiffs.

That about the 4th or 5th day of June, 1931, affiant and Frank Martin, Esq., of the firm of Martin & Martin, called on the Hon. Charles F. Koelsch, one of the Judges of the above entitled Court and the Judge who signed the judgment against American Surety Company of New York herein, and inquired about the existence of a formal motion to the Court and whether or not said judgment was entered in Open Court; that the Hon. Charles F. Koelsch then stated in effect to affiant and Mr. Martin that counsel for plaintiffs had presented to him at Chambers a form of judgment and requested the entry of judgment against American Surety Company of New York a day or two prior to June 23, 1930; that said Judge inquired about notice and counsel informed him that notice was unnecessary and presented authorities on that [91] point; that on June 23d counsel for plaintiffs again brought up the matter and the said Judge thereupon signed the judgment; that said request for

judgment was made to the Judge at Chambers and the entire proceedings were had at Chambers; that said Hon. Charles F. Koelsch further stated in effect that he told counsel for plaintiffs that he was signing the judgment largely as a *pro forma* matter and that he assumed defendant would take appropriate steps to bring the matter before the Court for further consideration; that this conversation with Judge Koelsch was the first notice or information which affiant or the firm of Richards & Haga had that said judgment was entered at Chambers and not in Open Court as stated in said judgment, and until said conversation affiant had relied upon the truth of the statement in said judgment that it was done in open court.

That after said conversation with the said Hon. Charles F. Koelsch, affiant made a careful examination of the register of actions in the above entitled cause and of the original files in said cause in the office of the Clerk and found that there was no motion for judgment and no written application of any sort for judgment against American Surety Company of New York on file in said cause and that there was no record of the same in the register of actions nor in the memorandum of papers endorsed on the file cover enclosing the files in said cause; that thereafter affiant also examined the District Court Journal for the period from June 20 to June 30, 1930, both dates inclusive, and found no reference whatever in said District Court Journal to the above entitled cause, except that on or about the date last mentioned there is a record

of the argument and submission of the motion of defendant American Surety Company to vacate the judgment entered against it in the above entitled cause.

McKEEN F. MORROW.

Subscribed and sworn to before me this 17th day of June, 1931.

[Seal] H. M. JEFFREY,
Notary Public for Idaho.
Residence: Boise, Idaho. [92]

EXHIBIT "C."

In the District Court of the Third Judicial District of the State of Idaho, in and for Ada County.

VIVIAN F. BALDWIN and E. R. BALDWIN,
Plaintiffs,

vs.

ED ANDERSON and AMERICAN SURETY COMPANY OF NEW YORK,
Defendants.

AFFIDAVIT OF A. J. GAMBLE.

State of Idaho,
County of Ada,—ss.

A. J. Gamble, being first duly sworn, upon his oath, deposes and says:

That he is Managing Director of Boise Trust Company, a corporation; that said Boise Trust Company is local agent for American Surety Company of New York in Ada County and was such

local agent in June, 1930, and affiant and Marie Baker, an employee of said Boise Trust Company, are authorized to execute surety bonds on behalf of said American Surety Company of New York;

That no notice whatever was given to said Boise Trust Company, or any of its officers, agents or employees, of any motion or application for judgment against American Surety Company of New York in the above entitled cause, and the first information said Boise Trust Company or this affiant had of the entry of said judgment was after said judgment had been signed and entered and execution issued thereon.

Further, affiant sa*ye*th not.

A. J. GAMBLE.

Subscribed and sworn to before me this 17th day of June, 1931.

[Seal] MARIE L. BAKER,
Notary Public for Idaho.
Residence: Boise, Idaho. [93]

EXHIBIT "D."

In the District Court of the Third Judicial District of the State of Idaho, in and for Ada County.

VIVIAN F. BALDWIN and E. R. BALDWIN,
Plaintiffs,

vs.

ED ANDERSON and AMERICAN SURETY COMPANY OF NEW YORK, a Corporation,
Defendants.

AFFIDAVIT OF HOWARD E. STEIN.

State of Idaho,
County of Ada,—ss.

Howard E. Stein, being first duly sworn, upon his oath deposes and says:

That in June, 1930, he was a member of the firm of Stein-Lake Company, the other member being Archie W. Lake. That during June, 1930, affiant and the said Archie W. Lake were local agents for American Surety Company of New York and held Power of Attorney from said Company to execute certain bonds and undertakings on behalf of said Company; that affiant had charge of the bond business for said Stein-Lake Company.

That no notice whatever was given to affiant or said Archie W. Lake, or to any of their employees, of any motion or application for judgment against American Surety Company of New York in the above entitled cause, and affiant was first informed that judgment had been taken against said American Surety Company of New York in the above entitled cause by Messrs. Richards & Haga, of Boise, Idaho, after said judgment had been signed and entered.

Further affiant sayeth not.

HOWARD E. STEIN.

Subscribed and sworn to before me this 17th day of June, 1931.

[Seal] L. M. HIGGINS,
Notary Public.
Residence: Boise, Idaho. [94]

EXHIBIT "E."

In the District Court of the Third Judicial District of the State of Idaho, in and for Ada County.

VIVIAN F. BALDWIN and E. R. BALDWIN,
Plaintiffs,

vs.

ED ANDERSON and AMERICAN SURETY COMPANY OF NEW YORK, a Corporation,
Defendants.

AFFIDAVIT OF THOS. E. POWELL.

State of Idaho,
County of Ada,—ss.

Thos. E. Powell, being first duly sworn, upon his oath deposes and says:

That he is a Deputy Clerk of the above entitled Court and his duties are those of Court Room Clerk, the other Court Room Clerk being B. Clyde Eagleson. That it is part of his duties as such Court Room Clerk to transcribe from the longhand notes of Deputy Clerk B. Clyde Eagleson the minute Entries for the District Court journal of all Court proceedings in the Court which said Deputy Clerk B. Clyde Eagleson attends; that he transcribed from the longhand notes of said B. Clyde Eagleson the minutes of Court proceedings had before Judge Koelsch on June 23, 1930, and placed them in the District Court journal, and the said longhand notes were thereupon destroyed. That

Exhibit "X," attached to the affidavit of B. Clyde Eagleson, being a certified copy of the minutes of proceedings before the Court presided over by the Honorable Charles F. Koelsch, as District Judge, contains all the Court proceedings had on June 23, 1930, before said Court which were shown by the longhand notes of said B. Clyde Eagleson delivered to affiant for the purpose of transcription, as aforesaid. Affiant further says that he transcribed from similar notes taken either by himself or by the said B. Clyde Eagleson all court proceedings had or taken in the Court presided over by the Honorable Charles F. Koelsch, as District Judge, during the period from June 20, 1930, to June 24, 1930, both dates inclusive, and that the same are correctly transcribed in the District Court journal covering said period and that there is no reference in said District Court journal for the period from June 20, 1930, to June 24, 1930, both dates inclusive, to any proceedings had or taken in Court in the above entitled cause.

Further affiant sa*y*eth not.

THOS. E. POWELL.

Subscribed and sworn to before me this 17th day of June, 1931.

(Seal of District Court.)

STEPHEN UTTER,
Clerk.

By B. Clyde Eagleson,
Deputy Clerk. [95]

EXHIBIT "F."

In the District Court of the Third Judicial District of the State of Idaho, in and for Ada County.

VIVIAN F. BALDWIN and E. R. BALDWIN,
Plaintiffs,

vs.

ED ANDERSON and AMERICAN SURETY COMPANY OF NEW YORK, a Corporation,
Defendants.

AFFIDAVIT OF B. CLYDE EAGLESON.

State of Idaho,
County of Ada,—ss.

B. Clyde Eagleson, being first duly sworn, upon his oath deposes and says: That he is a Deputy Clerk of the above entitled Court and his duties are those of a Court Room Clerk, the other Court Room Clerk being Thos. E. Powell. That it is part of his duties as such Court Room Clerk to write down minute entries for the District Court journal of all court proceedings in the particular court which he happens to be attending which are thereafter transcribed by the said Thos. E. Powell. That on June 23, 1930, affiant was Court Room Clerk in the Court of District Judge Charles F. Koelsch and distinctly recalls being present when certain proceedings mentioned in the District Court journal for that date were had; that he wrote down in longhand all Court proceedings had on June

23, 1930, before the Honorable Charles F. Koelsch, as District Judge, and turned them over to the said Thos. E. Powell, Deputy Clerk, for transcribing, and that there were no proceedings had in Open Court before the Honorable Charles F. Koelsch, as District Judge, on said June 23, 1930, other than those shown in Exhibit "X" attached to this affidavit and made a part hereof, the said exhibit being a certified copy of the minutes of court proceedings before the said Honorable Charles F. Koelsch as the same appear in District Court journal, Book "Y," Page 125.

That the proceedings with reference to the judgment in favor of Vivian F. Baldwin and E. R. Baldwin and against American Surety Company of New York in the above entitled cause were all had before the Honorable Charles F. Koelsch, District Judge, at Chambers, and if the same had been had in Open Court a minute thereof would appear in the District Court journal; that affiant has examined the District Court journal from June 20, 1930, to June 24, 1930, both dates inclusive, and there is no reference therein to the above entitled cause or to the judgment entered in said cause against American Surety Company of New York, and affiant further says he has examined the Register of Actions in said cause and the same does not show the filing of any motion for judgment herein, and that he has also examined the original files in said cause and that no motion for judgment in favor of the above named plaintiffs and against American Surety Company of New York, a cor-

poration, appears in said files. Further affiant sayeth not.

B. CLYDE EAGLESON.

Subscribed and sworn to before me this 17th day of June, 1931.

(Seal of District Court)

STEPHEN UTTER,
Clerk.
By Thos. E. Powell,
Deputy. [96]

EXHIBIT "X."

Journal Y, District Court, Ada County, Idaho.

Boise, Idaho, June 23d, 1930.

One hundred and sixtieth judicial day of the District Court of the Third Judicial District of the State of Idaho, in and for the county of Ada. Present, Hon. DANA E. BRINCK and Hon. CHAS. F. KOELSCH, District Judges, and the officers of the court.

After the reading and approval of the minutes of June 21st, 1930, the following proceedings were had before Hon. Dana E. Brinck, to wit:

. . . . . .

Whereupon the following proceedings were had before Hon. Chas. F. Koelsch, to wit:

No. 12,643.

DUFRESNE AUTOMOBILE CO.

vs.

T. A. HAMILTON.

In this cause, the defendant's petition for a rehearing was argued before the Court by counsel for respective parties and taken under advisement.

No. 12,861.

PETER NIELSON

vs.

M. F. STEWART et al.

In this cause, the demurrers and motions were argued before the court by counsel for respective parties and taken under advisement, counsel for respective parties to file briefs within five days.

CRIM. No. 328.

STATE OF IDAHO

vs.

CLYDE PULLIAM, True Name TED PULLIAM.

The Prosecuting Attorney with the defendant came into court, the defendant to be arraigned upon the information filed against him charging him with the crime of driving a motor while under the influence of intoxicating liquor. [97]

The defendant stated in answer to the Court that the name by which he had been informed against was his true name and that he had no counsel and did not want counsel to represent him herein.

The Clerk, under the direction of the Court, read the information herein to the defendant and furnisher him with a true copy thereof, together with all indorsements thereon.

The defendant waived the statutory time to plead and also the time allowed by the Court, and desired to plead forthwith, which was granted by the Court.

The Court asked the defendant if he pleaded "Guilty" or "Not Guilty" as charged, and thereupon the defendant pleaded that he is "Not Guilty" as charged in the information.

Whereupon the Court ordered that this court *fo* now adjourn until 10 A. M. June 24th, 1930.

CHAS. F. KOELSCH,
District Judge.

State of Idaho,
County of Ada,—ss.

CERTIFICATE.

I, Stephen Utter, Clerk of the District Court of the Third Judicial District of the State of Idaho, in and for the County of Ada, do hereby certify that the foregoing is a true and correct copy of the original page of Journal Y records of the Third Judicial District of the State of Idaho, in and for Ada County, for the date June 23d, 1930, relative to the cases which came before Judge Chas. F. Koelsch.

Given under my hand and the seal of said Court, at office in Boise City, Ada County, Idaho, this 16 day of June, 1931.

(Seal of District Court)

STEPHEN UTTER,
Clerk.
By Frances Wood,
Deputy. [98]

[Title of Court and Cause.]

NOTICE OF LEVY OF WRIT OF EXECUTION.

To American Surety Company of New York:

You are hereby notified that pursuant to the writ of execution issued in the above-entitled cause and out of the above-entitled court, a true copy of which writ of execution is hereunto attached and by this reference thereto specifically made a part hereof, the sheriff of Ada County, State of Idaho, has levied upon, and by virtue of such levy has taken into his possession, those certain bonds deposited by you with the state treasurer of the State of Idaho pursuant to the provisions of Section 5104 of the Idaho Compiled Statutes, which bonds are more particularly described as follows, to wit:

United States Fourth Liberty Loan Bonds,
4¼%, Numbers 559144 to 559148, 5
bonds at $1,000 each.....$5,000.00
Numbers 46289 and 46290, 2 bonds at $10,-
000 each 20,000.00

And you are hereby further notified that on Wednesday the 5th day of August, 1931, at 10:00 o'clock A. M. of said day, at the front door of the county courthouse of Ada County, State of Idaho, which courthouse is situated in the city of Boise, Ada County, Idaho, the said sheriff will offer the aforesaid bonds for sale pursuant to said levy and in accordance with the laws of the State of Idaho, at public auction, and will sell the same to the

highest bidder, all as and in the manner prescribed [99] by the laws of the State of Idaho, to satisfy the judgment entered against American Surety Company of New York and in favor of Vivian F. Baldwin and E. R. Baldwin, the respective parties above named in the caption of this Notice, which judgment was entered in the above-entitled court and cause on the 23d day of June, 1930. The proceeds of said sale received by said sheriff will be paid by him to the above-named plaintiffs, judgment creditors herein, in payment of said judgment, and if, after said judgment shall be satisfied in full, any overplus of such proceeds shall remain in the hands of said sheriff, the same will be paid to you or as and to whomsoever you may order or direct.

WITNESS my hand this 19th day of June, 1931.

JOHN McGRATH,
Sheriff of Ada County, State of Idaho.
By James Brandon,
Deputy.

JAMES F. AILSHIE, Jr.,
J. R. SMEAD,
Attorneys for Vivian F. Baldwin and E. R. Baldwin, Plaintiffs Above Named and Judgment Creditors Herein. [100]

In the District Court of the Third Judicial District of the State of Idaho, in and for Ada County.

VIVIAN F. BALDWIN and E. R. BALDWIN,
Plaintiffs,

vs.

ED ANDERSON and THE AMERICAN SURETY COMPANY OF NEW YORK, a Corporation,
Defendants.

EXECUTION—GENERAL.

The People of the State of Idaho to the Sheriff of the County of Ada, GREETING:

Whereas, on the 23d day of June, A. D. 1930, Vivian F. Baldwin and E. R. Baldwin recovered a judgment in the said District Court of the Third Judicial District, of the State of Idaho, in and for the county of Ada, against The American Surety Company of New York, a corporation, for the sum of Twenty-two Thousand Three Hundred Fifty-seven and 21/100 Dollars, together with costs in the sum of $96.00 awarded by the Supreme Court of Idaho against said defendant by its remittitur dated June 2, 1931, with interest thereon at the rate of seven per cent per annum until paid, as appears to us of record.

AND WHEREAS, the judgment-roll in the action in which said judgment was entered, is filed in the Clerk's office of said court, in the county of Ada, and the said judgment was docketed in said

Clerk's office, in the said county, on the day and year first above written. And the sum of $22,-357.21, with interest from June 23, 1930, and $96.00 costs, together with interest at the rate of 7% per annum thereon from June 2, 1931, is now, at the date of this writ, actually due on said judgment.

NOW, you, the said sheriff, are hereby required to satisfy said judgment, with interest as aforesaid, out of the said personal property of said American Surety Company of New York, a corporation, or if sufficient personal property of said debtor cannot be found, then out of the real property in your county belonging to said debtor on the day whereon said judgment was docketed in said Ada County, or at any time thereafter, and make return of this writ within sixty days after the receipt hereof, with what you have done endorsed thereon.

WITNESS, Hon. CHAS. F. KOELSCH, Judge of the said Third Judicial District of the State of Idaho, in and for the county of Ada, this 17th day of June, A. D. 1931.

ATTEST my hand and the seal of said court, the day and year last above written.

[Seal of District Court]

STEPHEN UTTER,
Clerk.
By Otto G. Peterson,
Deputy Clerk. [101]

NOTICE OF SHERIFF'S SALE.

By virtue of an execution in my hands, issued out of the District Court of the Third Judicial District of the State of Idaho, in and for the county of Ada, in the suit of Vivian F. Baldwin and E. R. Baldwin, plaintiffs, against Ed Anderson and the American Surety Company of New York, a Corporation, defendants, duly attested the 17th day of June, A. D. 1931, I have levied upon all the right, title and interest of the said American Surety Company of New York, a corporation, in and to the following described property, situated in Ada County, Idaho, viz.:

Those certain bonds deposited by the American Surety Company of New York, a corporation, with the state treasurer of the State of Idaho pursuant to the laws of the State of Idaho, and particularly Section 5104 of the Idaho Compiled Statutes, which bonds are more particularly described as follows, to wit:

United States Fourth Liberty Loan Bonds, 4¼%, Numbers 559144 to 559148, 5 bonds at $1,000 each ..... $ 5,000.00

Numbers 46289 and 46290, 2 bonds at $10,000 each 20,000.00

NOW, THEREFORE, pursuant to the laws of the State of Idaho, in such case made and provided, and with particular reference to Section 5104, Idaho Compiled Statutes of 1919.

NOTICE IS HEREBY GIVEN, that on Wednesday, the 5th day of August, A. D. 1931, at 10:00

o'clock A. M. of said day, at the front door of the county courthouse of Ada County, State of Idaho, in the city of Boise, Ada County, Idaho, I will sell all the right, title and interest of the said American Surety Company of New York, in and to the said above-described property, at public auction, to the highest bidder for cash in lawful money of the United States, to satisfy said execution and all costs.

Given under my hand, this 25th day of June, A. D. 1931.

_____,

Sheriff.

By _____,

Deputy Sheriff. [102]

Filed June 30, 1931. Stephen Utter, Clerk. By B. Clyde Eagleson, Deputy.

[Title of Court and Cause.—No. 11,860.]

CERTIFICATE AND AFFIDAVITS.

Come now the plaintiffs, and without waiving their objections to motion of defendant American Surety Company of New York to amend and vacate the judgment of June 23, 1930, herein, enter as a part of the records and files in this action the following:

Certificate of Hon. Charles F. Koelsch, one of the Judges of the District Court of the Third Judicial District of the State of Idaho, in and for the County of Ada, who presided as such in open court on the 23d day of June, 1930.

Affidavit of James F. Ailshie, Jr.

Affidavit of J. R. Smead.

The minutes and records of this Court showing the terms of District Court in Ada County for the years 1930 and 1931, respectively, which are hereby specifically referred to and made a part hereof.

Dated this 30th day of June, 1931.

JAMES F. AILSHIE, Jr.,
J. R. SMEAD,
Attorneys for Plaintiffs. [103]

[Title of Court and Cause.]

AFFIDAVIT OF JAMES F. AILSHIE, Jr.

State of Idaho,
County of Ada,—ss.

James F. Ailshie, Jr., being first duly sworn, on oath deposes and says:

That at all times hereinafter mentioned I have been, and now am, a member of the Idaho Bar, and as such have been one of the attorneys of record for plaintiffs in the case of Vivian F. Baldwin and E. R. Baldwin, Plaintiffs, vs. Singer Sewing Machine Company and Ed Anderson, Defendants, complaint in which was filed in the District Court of the Third Judicial District of the State of Idaho, in and for the County of Ada, on or about March 1, 1928; that I have participated in all proceedings including the proceedings had in the District Court for Ada County on the 23d day of June, 1930.

That J. R. Smead, a member of the Idaho Bar, has at all times since the filing of the complaint

on March 1, 1928, been one of the attorneys of record for plaintiffs in said cause.

That prior to the 23d day of June, 1930, I had discussed and consulted with said Smead relative to moving for judgment against the American Surety Company in the event the [104] said judgment was not paid within thirty days after the filing of the remittitur of the Supreme Court, which said remittitur was filed on the 22d day of May, 1930; that we carefully computed the time and discussed the form of the motion, judgment, etc., and examined authorities bearing thereon; that on the morning of June 23, 1930, I telephoned said Smead and inquired of him if he desired to appear in court with me, to which the said Smead replied that he was otherwise engaged and deemed it unnecessary; that I thereupon went to the county courthouse at Boise, Idaho, where I found Judge Koelsch presiding in the south courtroom, and at that time a matter was being presented to him.

That after waiting for some time the matter then before the Court was closed, at or about 11:00 o'clock, whereupon I stepped to the Bench, court being still in session, and made a motion for judgment in favor of Vivian F. Baldwin and E. R. Baldwin and against the American Surety Company of New York, a corporation, upon its supersedeas undertaking filed in the case of Vivian F. Baldwin and E. R. Baldwin, Plaintiffs, vs. Singer Sewing Machine Company, a Corporation, and Ed Anderson, Defendants, and thereupon submitted a

form of judgment together with the complete records and files in said cause, including the opinion of the Supreme Court of the State of Idaho in said case dated April 10, 1930, and the remittitur issued pursuant thereto and filed in the District Court on the 22d day of May, 1930, also the undertaking of the American Surety Company referred to in the opinion of the Supreme Court of the State of Idaho dated May 2, 1931, in Baldwin vs. American Surety Company; that Judge Koelsch thereupon asked me if notice had been given the American Surety Company, to which I replied that no notice was necessary, and Judge Koelsch then requested that I furnish him authorities in connection with the matter; that I thereupon handed to him a copy [105] of the printed transcript in the case of U. S. Fidelity and Guaranty Company vs. Fort Misery Highway District, reported in 22 Fed. (2d) 369, together with a printed copy of the opinion of District Judge Frank S. Dietrich in said cause, and a number of citations, among them 22 Fed. (2d) 369, and Wood vs. Orford, 57 Cal. 157; that Judge Koelsch thereupon stated that he would take the matter under advisement, as he desired to consider the motion and examine the authorities and form of judgment; that I thereupon left the courthouse, returning about mid-afternoon, at which time I met Judge Dana E. Brinck, then one of the Judges of the District Court of the Third Judicial District of the State of Idaho, and went into his Chambers; that during the course of our conversation the matter then under advisement by

Judge Koelsch was discussed generally between us; that at about 3:30 o'clock P. M., or shortly thereafter, Judge Koelsch came into Judge Brinck's Chambers and indicated that he wished to talk to Judge Brinck, whereupon I left Judge Brinck's Chambers and stopped a few moments in the adjoining room talking with his court reporter, and then walked through a short hallway connecting Judge Brinck's Chambers with the north courtroom, the doors to which were open. That I had waited about said courtroom a short time when Judge Koelsch came into said north courtroom, the same being the room where the files, safe, and register of actions of said District Court are located; that at that time Judge Koelsch advised me that the motion had been granted, and he thereupon handed the judgment to the Clerk.

That the recitals as they appear in the judgment against the surety company entered on the 23d day of June, 1930, correctly state the facts as they occurred, and that said motion was granted and said judgment was signed after the Court had advised me that he would take the same under advisement, and that none of said proceedings were Chambers proceedings. [106]

JAMES F. AILSHIE, Jr.

Subscribed and sworn to before me this 20th day of June, 1931.

[Seal]

FERN B. JONES,
Notary Public for Idaho.
Residing at Boise, Idaho. [107]

[Title of Court and Cause.]

AFFIDAVIT OF J. R. SMEAD.

State of Idaho,
County of Ada,—ss.

J. R. Smead, being first duly sworn, deposes and says:

That he is an attorney at law duly licensed to practise such profession in the State of Idaho, and has been so practising, at Boise, Idaho, for more than twenty years; that he was one of the attorneys for plaintiffs in the case of Vivian F. Baldwin and E. R. Baldwin, Plaintiffs, vs. Singer Sewing Machine Company and Ed Anderson, Defendants, and was one of the attorneys in the case of the same plaintiffs vs. American Surety Company of New York; that after the remittitur of the Supreme Court in the case first mentioned above had been filed in the District Court of the Third Judicial District of the State of Idaho in and for the County of Ada, affiant and James F. Ailshie, Jr., who was also attorney for plaintiffs in both of said above-mentioned causes, consulted and discussed together, and collaborated, concerning a proceeding for judgment against said American Surety Company of New York on its supersedeas undertaking filed in the appeal of the said first-mentioned cause; that they together carefully calculated the time which must elapse before said proceeding could be taken, to wit, thirty days after the filing [108] of the aforesaid remittitur, and discovered that

June 21, 1930, would be the thirtieth day after such filing, excluding the date of such filing in the District Court as aforesaid, which date of filing said remittitur was May 22, 1930; that said 21st day of June fell on Saturday, and that affiant and said Ailshie therefore discovered that the first judicial day upon which such proceeding against said surety company on its undertaking could be had was Monday, June 23, 1930; that during all of said mentioned times affiant maintained his office in the First National Bank Building in Boise, and said Ailshie maintained his office in the Idaho Building in the same city; that on the morning of June 23, 1930, said Ailshie called affiant by telephone and advised him that he, the said Ailshie, was about to proceed to the District Court to present a motion for judgment on said supersedeas undertaking, and asked affiant if he wished to and could go with said Ailshie, to which affiant replied that he was otherwise occupied at that time, and that he believed it was unnecessary that more than one of counsel be present when such motion was presented; that at the close of that day, June 23d, said Ailshie again called affiant on the telephone and advised him that the motion for judgment on such undertaking had been granted, and such judgment had been entered against said surety company.

Referring to the affidavits on file herein in support of the motion to reform said judgment against said surety company, and particularly the statements contained in the affidavits of Frank Martin

and McKeen F. Morrow, affiant further states that when the appeal of said plaintiffs in their said case against said American Surety Company of New York was being perfected, and when the transcript on appeal was being prepared for filing in the Supreme Court of the State of Idaho in said cause, affiant and said James F. Ailshie, Jr., as attorneys for said plaintiffs, and the firms of Martin & Martin and Richards & Haga, together [109] with H. B. Walker, another practising attorney who appeared in said cause on appeal, executed a certificate concerning the contents of said transcript on appeal whereby they, and each of them, certified that said transcript on appeal contained "full, true and correct copies of the pleadings and proceedings" in said cause between said plaintiffs and American Surety Company of New York; and that said certificate became a part of, and now is a part of, the record on appeal in said cause, and appears of record in said cause in the Supreme Court of the State of Idaho.

That the said transcript on appeal, and the said copies of pleadings and proceedings therein, which copies were certified to be full, true, and correct copies of such pleadings and proceedings in said cause as above stated, contain and include no written motion for judgment against said Surety Company, and that the pleadings and proceedings and copies thereof submitted to said attorneys at the time they joined in such certificate contained and included no written motion for such judgment;

that said attorneys further stated in said certificate that they had "compared the foregoing transcript with the original papers," and affiant therefore states that the said law firms of Martin & Martin and Richards & Haga knew at the time of making said certificate, which was on the 5th day of September, 1930, and have known ever since, that no written motion for judgment was included in, or constituted any part of, the record of proceedings for a judgment against said surety company on its said supersedeas undertaking herein.

J. R. SMEAD.

Subscribed and sworn to before me this 30th day of June, 1931.

[Seal] FERN B. JONES,
Notary Public for Idaho.
Residing at Boise, Idaho. [110]

[Title of Court and Cause.]

CERTIFICATE OF JUDGE OF DISTRICT COURT TO JUDGMENT.

I, Charles F. Koelsch, one of the Presiding Judges of the District Court of the Third Judicial District of the State of Idaho, do hereby certify:

That on the 23d day of June, 1930, I was a duly qualified and acting Judge of the Third Judicial District of the State of Idaho and, as such Judge, was sitting and holding court in Ada County therein; that I have examined the judgment of the court, together with the various records and files in this case, for the purpose of refreshing my recollection

of proceedings had before me on said date; that during the morning of June 23, 1930, several matters were being presented to me in the south courtroom of the Ada County courthouse at Boise, Idaho; that at about the hour of 11:00 o'clock A. M., the hearing of one contested matter was concluded and immediately thereupon James F. Ailshie, Jr., stepped to the bench, court being still in session, and made a motion for judgment in favor of Vivian F. Baldwin and E. R. Baldwin and against the American Surety Company upon its supersedeas undertaking filed in [111] the case of Vivian F. Baldwin and E. R. Baldwin vs. Singer Sewing Machine Company, a Corporation, and Ed Anderson, Defendants, and thereupon submitted a form of judgment, together with the complete records and files in said cause, including the opinion of the Supreme Court of the State of Idaho in said case, dated April 10, 1930, and the remittitur issued pursuant thereto, also the undertaking of the American Surety Company referred to in the opinion of the Supreme Court of the State of Idaho, dated May 2, 1931, in Baldwin vs. American Surety Company, and I thereupon asked said James F. Ailshie, Jr., if notice had been given the Surety Company and he replied that none was necessary, whereupon I requested of him authorities in connection with the matter, which were handed to me, including U. S. Fidelity and Guaranty Co. vs. Fort Misery Highway District, reported in 22 Fed. (2d) 369, and Wood vs. Orford, 56 Cal. 157. I then told him I would consider the motion and take the matter under advisement; that I thereafter examined said authorities

and the records and files in the action, and at approximately 3:30 o'clock P. M. of said day I consulted with Judge Dana E. Brinck in his office in the Ada County courthouse, during which time said attorney James F. Ailshie, Jr., was waiting in the north or large courtroom in said building; that immediately upon leaving Judge Brinck's office I stepped into said north or large courtroom and advised the said attorney that the motion was granted, and that I had signed the said judgment which is dated June 23, 1930, and caused the same to be immediately entered by the Clerk. [112]

That the recitals as they appear in the judgment against the Surety Company, above referred to, correctly state the facts as they occurred. I further certify that said judgment was not entered merely *pro forma* but was signed after I had considered the motion, studied the files and read a number of authorities, and none of said proceedings were Chambers proceedings.

Dated this 23d day of June, 1931.

CHAS. F. KOELSCH,
District Judge. [113]

Filed June 30, 1931. Stephen Utter, Clerk. By B. Clyde Eagleson, Deputy.

[Title of Court and Cause—No. 11,860.]

OBJECTION TO CONSIDERATION OF PRETENDED MOTION OF AMERICAN SURETY COMPANY OF NEW YORK.

Come now the plaintiffs above named and OBJECT to the consideration of the pretended motion

of the American Surety Company of New York heretofore filed, and as grounds therefor say:

I.

That the Court is without jurisdiction to hear said motion and is without jurisdiction to amend that certain judgment entered in the above-entitled cause on the 23d day of June, 1930, for the following reasons, among others:

A. That said judgment of June 23, 1930, is a final judgment, and from and after the 2d day of June, 1931, this Court has had no power to take any action whatsoever respecting said judgment save and excepting to issue execution thereon.

B. That no motion to amend said judgment was made at the term of court during which said judgment was entered, and that one term of the District Court of the Third Judicial District of the State of Idaho in and for the County of Ada has been opened and closed, and a second term opened and still in session, since the closing of the term at which said judgment was entered, and more than six months had elapsed after the close of the term [114] at which said judgment was entered before said motion to amend or reform said judgment was filed or made herein.

C. That said motion is based on pretended facts not contained in the records and files of the action, and of which the records and files exhibit no evidence whatever.

D. That the affidavits of Frank Martin and McKeen F. Morrow, or either of them, set forth no

fact showing any error in, or cause for amending, said judgment, and the pretended statements of fact at variance with the recitals in said judgment, contained in said affidavits, constitute hearsay, and said affidavits and the said pretended facts therein contained would not, and could not, constitute competent legal evidence in this regard.

II.

Paragraph II of said motion constitutes a second motion made in this court to vacate and set aside the judgment of June 23, 1930, for the reason that on June 26, 1930, the said defendant American Surety Company of New York filed and presented to this court a motion to vacate and set aside said judgment, which said motion was thereafter passed upon by this court and was passed upon by the Supreme Court of the State of Idaho in an opinion dated May 2, 1931, to which reference is hereby made, and that thereafter the remittitur of the Supreme Court was filed in this court on the 2d day of June, 1931.

III.

That on the 17th day of June, 1931, and prior to the filing or serving of defendant's motion, an execution pursuant to said judgment of June 23, 1930, was issued out of this Honorable Court and was placed in the hands of the sheriff of Ada County, Idaho, on June 17, 1931, and levy was made by the said sheriff of Ada County on property of the American Surety Company of New York on said date, and that proceedings in execution [115] have at all times since said date been under way, and are now pending.

IV.

That all of the recitals contained in said judgment of June 23, 1930, are in fact true and correct.

V.

That said motion is sham and frivolous.

JAMES F. AILSHIE, Jr.,
J. R. SMEAD,
Attorneys for Plaintiffs. [116]

DEFENDANT'S SHOWING No. 3.

U. S. District Court, District of Idaho. Filed Jul. 22, 1931. W. D. McReynolds, Clerk. By ————, Deputy.

In the District Court of the Third Judicial District of the State of Idaho, in and for the County of Ada.

CIVIL No. 11,860.

VIVIAN F. BALDWIN and E. R. BALDWIN,
Plaintiffs,

vs.

ED ANDERSON and AMERICAN SURETY COMPANY OF NEW YORK, a Corporation,
Defendants.

COURT REPORTER'S TRANSCRIPT.

Date: June 30, 1931, in Boise, Idaho.

FRANK J. KESTER,
Official Reporter, Boise, Idaho. [117]

In the District Court of the Third Judicial District of the State of Idaho, in and for the County of Ada.

CIVIL No. 11,860.

VIVIAN F. BALDWIN and E. R. BALDWIN,
Plaintiffs,

vs.

ED ANDERSON and AMERICAN SURETY COMPANY OF NEW YORK, a Corporation,
Defendants.

REPORTER'S TRANSCRIPT.

This cause came regularly on for hearing on motion of defendant American Surety Company of New York to amend and vacate the judgment theretofore entered against said defendant on June 23, 1930, at the courthouse in Boise, Ada County, Idaho, commencing at 2:15 o'clock in the afternoon of Tuesday, June 30, 1931, before the Honorable CHAS. F. KOELSCH, District Judge, sitting without a jury, the plaintiffs and the said defendant American Surety Company of New York being represented by counsel, and said defendant Ed Anderson not being present in person or by counsel.

APPEARANCES:

For the Plaintiffs: JAMES F. AILSHIE, Jr., and JOHN R. SMEAD, Attorneys-at-law, Boise, Idaho.

For the Defendant American Surety Company of New York: MARTIN & MARTIN, and [118] RICHARDS & HAGA, Attorneys-at-law, Boise, Idaho.

Transcript prepared and proceedings reported by FRANK J. KESTER, Official Court Reporter, Third Judicial District, Boise, Idaho.

WHEREUPON, the following proceedings were had, to wit:

The COURT.—I desire to have a reporter here to make a record of this statement. Let me state at this time that I have read these affidavits. This matter was called to my attention one day by General Martin and Mr. Morrow coming into my office without preliminary notice as to what was wanted, and at that time asked me to state from memory what I recalled as to the physical proceedings concerning the matter that had taken place the year before; and at that time I gave them, as nearly as I could from memory, what I recalled.

Since that time I have of course studied this matter over, and tried to recall the things that took place, with the appreciation of the importance attached thereto by counsel; and even with that restudy I find that there was but one major error I made in my oral statement to counsel upon the day referred to.

At that time I stated that, according to my memory, [119] the matter was presented to me one day and considered at least to another day, and I think I stated possibly two days, but at least to another day; however, since studying the matter over I find that I was in error in reference to that. As I recall it, and recall it distinctly, because I have since ascertained the associations of other matters with this, the matter was presented to me in the morning and I then read the authorities referred

to, and signed the judgment on the afternoon of the same day. I recall distinctly that that was the fact, and that it was not, as I told counsel at first, carried over to another day.

There may have been other matters that were not just as clear in my mind as they are, but whatever they are, the statement I made was made—and I may say there may be errors in my statement now —was made from my best recollection at that time; and if it helps this matter any I am willing to state it offhand just exactly as I recall it:

On the morning of June 23, 1930, there was a matter argued before me, with J. F. Martin counsel on the one side and Vestal Coffin of the Firm of Fisher and Coffin on the other side; the matter was entitled Dufresne Automobile Company against Hamilton. That matter was set for ten o'clock; and the record of this court shows that there was another matter of which I have absolutely no independent recollection, namely, the matter of paroling or sentencing of a defendant under a criminal statute, but which, as I say, I have absolutely no independent recollection. [120] I do recall the civil proceeding. It took place in the south courtroom of this courthouse, and the argument was ended, as I recall it, along about eleven o'clock in the morning. A few minutes before the argument was ended, James F. Ailshie, Jr., came into the courtroom and sat down in one of the jurors' chairs, and to all intents and purposes was listening to the argument made by counsel in the other matter.

So soon as counsel in the other matter concluded, Mr. Ailshie came to my desk, which was the Judge's

desk in the courtroom, from which I had not stepped, at that time handed me a document, and orally stated, "I move,"—in substance and effect,—"I move for the entry of this judgment."

I looked at it, and when I saw the title of it, and saw and appreciated what he had said, the first question that I asked was in about this way, "Well, was notice given to the other side?" I did not use the word "defendant," but I said "to the other side."

Mr. Ailshie then responded that no notice was necessary, and that he had authorities to show that no notice was necessary. I was about to step off of my bench, anyway, and I then said to him, "You will have to show me the authorities," and Mr. Ailshie then and there handed me a printed, paper-bound booklet which was a transcript used in the federal court in the case of Fort Misery Highway District against somebody, defendant, whose name I have forgotten—or at least the Fort Misery Highway District was one of the parties; it may have been a defendant— [121] but in it, it included an opinion of Judge Dietrich of the federal court on this question that I have asked counsel, whether notice had been given to the other side.

I took this matter under advisement, and told Mr. Ailshie that I would read the opinion to which he pointed out in that paper-bound transcript, and Mr. Ailshie then also called my attention to a decision from the California court entitled, Wood against Orford, which he claimed was in point on this question of the propriety of entering this judgment.

I looked at that decision before Mr. Ailshie left my Chambers. I might say that by that time we had reached my Chambers. I looked at that decision, and as I did so I asked for Mr. Ailshie's interpretation of that decision. It resulted in a little discussion as to the import of that decision, and I told Mr. Ailshie I would consider the matter further, and he then left.

I did consider it further, and read Judge Dietrich's opinion, and re-read the decision in Wood *versus* Orford. In the afternoon I studied the matter over quite at length, and I think it was somewhere about three-thirty that afternoon when I picked up the proposed judgment and walked to Judge Brinck's Chambers with the idea of getting his view on what I was about to do—because by that time I had more or less made up my mind as to what I should do.

When I reached Judge Brinck's Chambers, I found James F. Ailshie, Jr., there. From the actions of the two men I [122] drew the conclusion —the correctness of which was afterwards verified —that when I stepped into Judge Brinck's Chambers they were in fact talking about this very procedure; but the moment I entered they ceased, and in fact the manner of their ceasing was what gave me the intimation that they had been talking about that matter. They then took up another subject of conversation while I sat down, and re-read the judgment, which was at that time still unsigned. In a moment or two Mr. Ailshie left, and I remarked to Judge Brinck, "I am about to sign an important judgment." Judge Brinck smiled, and

let me understand without so saying, that he understood what judgment I referred to.

I then remarked, in substance and effect, that I had studied over the matter and believed that was the only thing for me to do. Judge Brinck responded by saying, "I would do it, because undoubtedly the defendant will take some procedure which will get it its day in court."

My recollection is that I then and there borrowed from Judge Brinck his fountain-pen and signed the judgment in his Chambers. Of this matter I am not positive, however, because I have not seen the original judgment.

And let me say here that I might change my mind as to where, the exact place I was when I signed this judgment, if I could see the judgment itself, from these facts: If it was signed with Judge Brinck's fountain-pen, which my memory tells me it was, the handwriting would be heavy handwriting, because fountain-pens are [123] not easy-flowing, and I write a very light hand when I have an easy-writing pen; therefore, if the judgment is signed by a free-flowing hand, it must have been signed at the Clerk's desk. But I reiterate that my memory serves me that I signed it in Judge Brinck's Chambers with his fountain-pen, and that I, before or after signing, walked in to the Clerk's desk and—if I didn't sign it there, if it had been signed,—handed it to the Clerk and told him to enter it.

General FRANK MARTIN. — (Interposing.) Would your Honor—

The COURT.—Just one minute—I will make it

more full, and then you can make your statement. (Continuing.) So far as the statements made to counsel, made when they called upon me upon the day referred to, and under the circumstances referred to, I state now that I at no time said that this was not done in open court. I did say at that time that I considered it, the signing of the judgment, merely a formal matter at that time.

Let me repeat that I stated in the interview with General Martin and Mr. Morrow that at that time I considered that the signing of the judgment in the way it was done was a formal matter, with the idea that the defendant would take such procedure as would give it a hearing.

And let me say that I have at all times considered this judgment just as sound as any other judgment I have ever signed. Let me also say that I may have been too informal in the ceremonies attendant upon my signing [124] this judgment, due to the fact that I never did attach the importance to ceremonies and rituals that some people attach thereto, and in my judgment the mere ceremony cannot add to or detract from either the man or the instrument.

(At the direction of Court and counsel, the discussion had at this juncture was omitted.)

The COURT.—(After examining the files.) Having now examined the judgment, and my signature thereto, I state unhesitatingly that I was in error when I said that the judgment was signed in Judge Brinck's Chambers, or with his fountain-pen. The judgment was signed at the Clerk's desk, and with his pen, or one of his pens.

General FRANK MARTIN.—Now, would your

Honor mind stating when your session adjourned that day, as near as you can remember?

The COURT.—The session—

General FRANK MARTIN.— —of the court?

The COURT.—Well, General, we consider the court in session all the time. Just as you noticed just now: There was a man brought in here to be arraigned, and I stepped up on to the bench and considered that court was in session. As I understand it, the theory is that we start our February term in February, and we are in continuous session.

General FRANK MARTIN.—I don't mean the session which continues on from day to day; I mean the daily session.

The COURT.—Well, that's a conclusion that can be [125] drawn; different minds can draw different conclusions from it. If I am in my Chambers and a matter comes up during the day that requires my stepping up on the bench to hear it, I do so, and consider that court is in session.

General FRANK MARTIN.—What time did your Honor leave, that day?

The COURT.—How is that?

General FRANK MARTIN.—Well, what time did your Honor leave the bench that day?

The COURT.—About eleven o'clock, as I stated.

General FRANK MARTIN.—That's what I wanted you to state.

The COURT.—Yes, I didn't come back on the bench that day, unless that came up in the afternoon —but if that came up in the morning I did not again step up on the bench that day.

General FRANK MARTIN.—Now, if your Honor please, we move tc strike out the statement purporting to be the statement of the Judge of this court, attached to the affidavit of the plaintiffs, and that the statement of your Honor in open court be considered as the only statement of your Honor in this case, because there are some conclusions made in this statement.

The COURT.—Well, that statement was made, General, on the request of counsel, prepared by them, and by me signed; and if there is anything inconsistent with what I have said now, what I have now stated is my best recollection. [126]

General FRANK MARTIN.—Your best recollection, notwithstanding these other statements?

The COURT.—Yes.

Mr. AILSHIE.—Your Honor please, we resist the motion.

(Argument on this motion omitted.)

The COURT.—I will let them all stand.

Mr. AILSHIE.—You state that this was prepared by counsel for the plaintiffs, which is correct, but as I am advised—

The COURT.—(Interposing.) Referring to the statement I made there?

Mr. AILSHIE.—Yes. But as I am advised, the statement which counsel for the plaintiff prepared was corrected by you and rewritten before it was signed?

The COURT.—Yes, I can show you the parts that were rewritten; I can show you the parts that I objected to, that were rewritten. Have you a copy of it?

Mr. AILSHIE.—I haven't the original copy, but I was simply advised—

The COURT.—(Referring to statement.) On page 2 thereof, the original stated—well, it reads, "that immediately upon leaving Judge Brinck's office I stepped into said north or large courtroom and advised the said attorney that the motion was granted, and that I had signed the said judgment." The statement as originally made, and which I objected to and had corrected, was to the effect that I walked into the north or large courtroom and advised the counsel that the motion was [127] granted and that I would sign the said judgment—indicating that I had walked into the courtroom and signed it, which happens to be the fact, now, although I asked that that be changed before I signed it; and though it appears now that that was the fact, my independent recollection still tells me that I signed it in there; but I am convinced against my will that I didn't, and that if I had signed it with Judge Brinck's pen it would be a different signature than it is.

Mr. AILSHIE.—Let me state that the reason I prepared that statement in that way was because it was my independent recollection that you signed it at the Clerk's desk. In deference to your Honor's recollection, I did not state positively in my affidavit where it was signed, because of the fact that your Honor felt that it was signed in Judge Brinck's room, rather than out here; and that caused me to have some doubt as to the accuracy of my recollection, because my independent recollection is that you signed it out here in the courtroom.

The COURT.—My independent recollection of that fails me. It must have been some other document I signed with Judge Brinck's pen.

Mr. MORROW.—I assume the statement is concluded, your Honor?

The COURT.—Yes. We will not need the reporter any further.

(Argument of counsel to the Court, omitted.)

REPORTER'S CERTIFICATE.

I, Frank J. Kester, do hereby certify: [128] That I am one of the official reporters of the Third Judicial District of the State of Idaho; that under the direction of the Honorable Chas. F. Koelsch I attended the above-entitled hearing and correctly reported in shorthand the testimony and proceedings taken and had at said hearing; that the foregoing reporter's transcript is a full, true, correct, and complete transcript of my shorthand notes taken at said hearing, and is a full, true, correct, and complete record of the testimony given and the proceedings had thereat.

Dated this 21st day of July, 1931.

FRANK J. KESTER,
Official Reporter, Boise, Idaho. [129]

[Title of Court and Cause.]

ORDER AND CERTIFICATE SETTLING TRANSCRIPT.

In the above-entitled matter the defendant having filed in the above-entitled court and cause its

motion to amend and vacate the judgment theretofore entered against said defendant herein on June 23, 1930.

And said motion coming on to be heard in the above-entitled court on June 30, 1931, and defendant through its counsel of record herein thereupon requesting that the undersigned Presiding Judge of said court make a statement of record in connection with the hearing of the said motion as to the facts and circumstances under which said judgment herein against said defendant was entered as aforesaid.

Whereupon the said Presiding Judge in response to said request made such statement, which was taken in shorthand by the official reporter of said court,—

NOW, THEREFORE it is hereby certified that the transcript of such statement hereto attached is a true and correct record of such statement and it is hereby ordered that the same be, and hereby is, settled as a correct transcript and record of such statement made by said Presiding Judge as above recited.

(Signed) CHARLES F. KOELSCH,
District Judge. [130]

Filed July 13, 1931. Stephen Utter, Clerk. By B. Clyde Eagleson, Deputy.

[Title of Court and Cause—No. 11,860.]

NOTICE OF APPEAL.

To the Above-named Plaintiffs Vivian F. Baldwin and E. R. Baldwin, and to James F. Ailshie,

Jr., and J. R. Smead, Their Attorneys of Record, and to Ed Anderson, Defendant, and to H. B. Walker, His Attorney of Record, and the Clerk of the Above-entitled Court:

You, and each of you will please take notice that American Surety Company of New York, a corporation, surety, one of the above-named defendants, hereby appeals to the Supreme Court of the State of Idaho from that certain judgment for $22,357.-21, filed and entered against the said defendant in the District Court of the Third Judicial District of the State of Idaho, in and for Ada County on June 23, 1930, and from the whole of said judgment against said defendant American Surety Company of New York.

Dated this 13th day of July, 1931.

RICHARDS & HAGA,
MARTIN & MARTIN,
Attorneys for Defendant American Surety Company of New York, Residence: Boise, Idaho.

Service of the above and foregoing notice of appeal is hereby admitted this 13th day of July, at 2:10 P. M.

JAMES F AILSHIE, Jr.,
J. R. SMEAD,
Attorneys for Plaintiffs. [131]

Service of the above and foregoing notice of appeal is hereby admitted this 13th day of July, 1931.

ED ANDERSON,
Defendant.

State of Idaho,
County of Ada,—ss.

McKeen F. Morrow, being first duly sworn upon his oath, deposes and says: That he is one of the attorneys for defendant and appellant American Surety Company of New York in the above-entitled cause; that on the 13th day of July, 1931, at 3:45 o'clock P. M. of said day, he served a copy of the above and foregoing notice of appeal upon H. B. Walker, attorney of record for defendant Ed Anderson, by depositing at said hour on said date in the United States Postoffice at Boise, Idaho, a true and correct copy of the above and foregoing notice of appeal enclosed in an envelope with ordinary postage prepaid thereon addressed to said H. B. Walker at Laramie, Wyoming; that said H. B. Walker since the trial herein has left the State of Idaho and his present residence and postoffice address is Laramie, Wyoming, and there is direct communication by United States mail between said Postoffice at Boise, Idaho, and Laramie, Wyoming.

McKEEN F. MORROW.

Subscribed and sworn to before me this 13th day of July, 1931.

[Seal] H. M. JEFFREY,
Notary Public for Idaho.
Residence: Boise, Idaho. [132]

Filed July 13, 1931, 4:04 P. M. Stephen Utter, Clerk. By B. Clyde Eagleson, Deputy.

[Title of Court and Cause.]

UNDERTAKING ON APPEAL.

WHEREAS, the above-named defendant American Surety Company of New York has appealed to the Supreme Court of the State of Idaho from that certain judgment in the above-entitled cause filed and entered in the above-entitled court on the 23d day of June, 1930, and

WHEREAS, the said defendant desires to give an undertaking for all damages and costs that may be awarded against it on said appeal or a dismissal thereof as provided to be given by Section 7154, Idaho Compiled Statutes, 1919;

NOW, THEREFORE, in consideration of the premises and such appeal, Fidelity and Deposit Company of Maryland, a corporation organized and existing under and by virtue of the laws of the State of Maryland and duly authorized to give undertakings on appeal and become sole surety upon bonds and undertakings in judicial proceedings in the State of Idaho, does hereby undertake and promise on the part of said defendant and appellant American Surety Company of New York that said defendant and appellant will pay all costs and damages which may be awarded against it on said appeal or a dismissal thereof not exceeding the sum of Three Hundred Dollars ($300.00).

IN WITNESS WHEREOF, the said Fidelity and Deposit Company of Maryland, a corporation, has caused its corporate name to be hereunto subscribed and its corporate seal to be hereunto affixed by its duly authorized officers and agents this 13th day of July, 1931.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND.

[Corporate Seal] By GEO. C. WALKER,
Attorney-in-fact.
WALTER S. BRUCE,
Agent.

Countersigned:

WALTER S. BRUCE,
Resident Agent. [133]

Filed July 15, 1931. Stephen Utter, Clerk. By B. Clyde Eagleson, Deputy.

[Title of Court and Cause—No. 11,860.]

NOTICE OF APPEAL.

To the Above-named Plaintiffs Vivian F. Baldwin and E. R. Baldwin, and to James F. Ailshie, Jr., and J. R. Smead, Their Attorneys of Record, and to Ed. Anderson, Defendant, and to H. B. Walker, His Attorney of Record, and to the Clerk of the Above-entitled Court:

You and each of you will please take notice that American Surety Company of New York, a corporation, surety, one of the above-named defendants, hereby appeals to the Supreme Court of the State of Idaho from that certain order of the above-en-

titled Court made and entered on the 13th day of July, 1931, denying and overruling the motion of said defendant American Surety Company of New York to correct said judgment to make it speak the truth in certain particulars and to vacate said judgment as corrected and from the whole of said order.

Dated this 14th day of July, 1931.

RICHARDS & HAGA,
MARTIN & MARTIN,
Attorneys for Defendant American Surety Company of New York.

Residence: Boise, Idaho.

Service of the above and foregoing notice of appeal is hereby admitted this 14th day of July, 1931.

JAMES F. AILSHIE, Jr.,
J. R. SMEAD,
Attorneys for Plaintiffs. [134]

Service of the above and foregoing notice of appeal is hereby admitted this 14th day of July, 1931.

ED ANDERSON,
Defendant.

State of Idaho,
County of Ada,—ss.

McKeen F. Morrow, being first duly sworn, upon his oath, deposes and says: That he is one of the attorneys for defendant and appellant American Surety Company of New York in the above-entitled cause; that on the 14th day of July, 1931, he served a copy of the above and foregoing notice

of appeal upon H. B. Walker attorney of record for defendant Ed. Anderson, by depositing on said date in the United States Postoffice at Boise, Idaho, a true and correct copy of the above and foregoing notice of appeal enclosed in a sealed envelope with ordinary postage prepaid thereon addressed to said H. B. Walker at Laramie, Wyoming; that said H. B. Walker about the month of July, 1930, left the State of Idaho and his present residence and postoffice address is Laramie, Wyoming, and there is direct communication by United States mail between said Postoffice at Boise, Idaho, and Laramie, Wyoming.

McKEEN F. MORROW.

Subscribed and sworn to before me this 14th day of July, 1931.

[Seal] H. M. JEFFREY,
Notary Public for Idaho.
Residence: Boise, Idaho. [135]

Filed July 15, 1931. Stephen Utter, Clerk. By B. Clyde Eagleson, Deputy.

[Title of Court and Cause—No. 11,860.]

UNDERTAKING ON APPEAL.

WHEREAS, the above-named defendant American Surety Company of New York, has appealed to the Supreme Court of the State of Idaho from that certain order in the above-entitled cause made and entered in the above-entitled Court on the 13th day of July 1931, and

WHEREAS, the said defendant desires to give

an undertaking for all damages and costs that may be awarded against it on said appeal or a dismissal thereof as provided to be given by section 7154, Idaho Compiled Statutes, 1919;

NOW, THEREFORE, in consideration of the premises and such appeal, Fidelity and Deposit Company of Maryland, a corporation organized and existing under and by virtue of the laws of the State of Maryland and duly authorized to give undertakings on appeal and become sole surety upon bonds and undertakings in judicial proceedings, in the State of Idaho, does hereby undertake and promise on the part of said defendant and appellant American Surety Company of New York that said defendant and appellent will pay all costs and damages which may be awarded against it on said appeal or a dismissal thereof not exceeding the sum of Three Hundred Dollars ($300.00).

IN WITNESS WHEREOF, the said Fidelity and Deposit Company of Maryland, a corporation, has caused its corporate name to be hereunto subscribed and its corporate seal to be hereunto affixed by its duly authorized officers and agents this 15th day of July, 1931.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND.

[Corporate Seal] By GEO. C. WALKER,
Attorney-in-fact.
WALTER S. BRUCE.
Agent.

Countersigned:

WALTER S. BRUCE,
Resident Agent. [136]

Filed July 15, 1931. Stephen Utter, Clerk. By B. Clyde Eagleson, Deputy.

[Title of Court and Cause.]

APPLICATION FOR ORDER FOR REPORTER'S TRANSCRIPT.

To the Honorable CHARLES F. KOELSCH, Judge of the Above-entitled Court:

The above-named defendant American Surety Company of New York, a corporation, having appealed to the Supreme Court of the State of Idaho from that certain order made and entered on July 13, 1931, denying defendant's motion, hereby applies for an order directing the court reporter of this court to prepare a transcript of the proceedings had in said cause on June 30, 1931, including the statement made from the Bench by the Court at that time.

Dated this 15th day of July, 1931.

RICHARDS & HAGA,
MARTIN & MARTIN,
Attorneys for Defendant,
American Surety Company of New York.
Residence: Boise, Idaho. [137]

Filed July 15th, 1931. Stephen Utter, Clerk. By B. Clyde Eagleson, Deputy.

[Title of Court and Cause.]

ORDER RE PREPARATION AND COMPLETION OF TRANSCRIPT OF PROCEEDINGS.

To Frank Kester, Court Reporter of the Above-entitled Court:

You are hereby ordered to prepare a complete transcript of the proceedings had in the above-entitled cause on June 30, 1931, including the statement made by the Court from the Bench and to lodge the same with the Clerk of the above-entitled court within sixty days from the date hereof.

Dated this 15th day of July, 1931.

CHAS. F. KOELSCH,
District Judge.

Estimated Fee, $5.00, paid, and service of the above order and receipt of copy thereof is hereby admitted this 15th day of July, 1931.

FRANK J. KESTER,
Court Reporter. [138]

Journal Y, District Court, Ada County, Idaho—Page 429.

Boise, Idaho, July 13th, 1931.

One hundred and tenth judicial day of the District Court of the Third Judicial District of the State of Idaho, in and for the County of Ada. Present: Hon. CHAS. F. KOELSCH, District Judge, and the officers of the Court.

MINUTES OF COURT—JULY 11, 1931—ORDER OVERRULING AND DENYING MOTION OF AMERICAN SURETY COMPANY TO CORRECT JUDGMENT.

After the reading and approval of the minutes of July 11th, 1931, the following proceedings were had, to wit:

No. 11,860.

VIVIAN F. BALDWIN et al.

vs.

SINGER SEWING MACHINE CO. et al.

In this cause in open court, the motion of the American Surety Company to correct judgment having been heretofore taken under advisement, the Court at this time rendered its decision and overruled and denied said motion.

Thereupon the Court signed the order filed this day in the above case.

THEREUPON the Court ORDERED that this court do now adjourn until 10 o'clock A. M., July 15th, 1931.

CHAS. F. KOELSCH,
District Judge. [139]

Filed July 13, 1931. Stephen Utter, Clerk. By B. Clyde Eagleson, Deputy.

[Title of Court and Cause.]

ORDER OVERRULING AND DENYING MOTION OF AMERICAN SURETY COMPANY TO CORRECT AND AMEND JUDGMENT.

The motion of the American Surety Company of New York to correct and amend that certain judgment entered in the above-entitled cause on the 23d day of June, 1930, and to vacate and set aside the said judgment, coming on regularly for hearing on the 30th day of June, 1931, Messrs. Martin & Martin, and Richards & Haga appearing for the American Surety Company in support of said motion, and James F. Ailshie, Jr., and J. R. Smead appearing on behalf of plaintiffs, and the said motion having been argued and submitted, and briefs of counsel having been filed, the Court being now fully advised in the law and the premises, finds that said motion should be overruled and denied.

WHEREFORE, it is hereby ORDERED that the motion of the American Surety Company of New York, a corporation, to correct and amend the judgment of June 23, 1930, entered in the above-entitled cause and to vacate and set the same aside, should be and the same is hereby overruled and denied.

Done in open court this 13th day of July, 1931.

CHAS. F. KOELSCH,
District Judge. [140]

State of Idaho,
County of Ada,—ss.

I, Stephen Utter, Clerk of the District Court of the Third Judicial District of Idaho, in and for the County of Ada, do hereby certify that the foregoing are full, true and correct copies of the original.

1. Notice of motion to correct and vacate judgment.
2. Motion to correct and vacate judgment.
3. Affidavits of Frank Martin, McKeen F. Morrow, A. J. Gamble, Howard E. Stein, Thos. E. Powell and B. Clyde Eagleson.
4. Court Journal entry of June 23d, 1930.
5. Certificate and affidavits of James F. Ailshie, Jr., Charles F. Koelsch, and J. R. Smead.
6. Objection of plaintiffs to consideration of motion.
7. Order denying motion to correct and vacate judgment.
8. Notice of appeal (filed July 13, 1931.)
9. Undertaking on appeal (filed July 13, 1931).
10. Notice of appeal (filed July 15, 1931).
11. Undertaking on appeal (filed July 15, 1931).
12. Application for order for reporter's transcript.
13. Order for reporter's transcript, and
14. Court journal entry of July 13, 1931; filed in the above-entitled action and remain-

ing now on file in my office at Boise City, Idaho.

Given under my hand and the seal of said District Court this 18th day of July, 1931.

[Seal] STEPHEN UTTER,
Clerk of the District Court.
By Otto F. Peterson,
Deputy. [141]

U. S. District Court, District of Idaho. Filed Jul. 22, 1931. W. D. McReynolds, Clerk. By ————, Deputy.

DEFENDANTS' SHOWING No. 2.

In the District Court of the United States, for the District of Idaho, Southern Division.

AMERICAN SURETY COMPANY OF NEW YORK, a Corporation,
Complainant,

vs.

VIVIAN F. BALDWIN and E. R. BALDWIN,
Defendants.

AFFIDAVIT OF CHARLES F. KOELSCH.

United States of America,
District of Idaho,
Southern Division,—ss.

Charles F. Koelsch, being first duly sworn on oath, deposes and says: That I am one of the duly qualified and acting Judges of the District Court of the Third Judicial District of the State

of Idaho, wherein is situated the county of Ada, and have occupied such position since prior to the 23d day of June, 1930; that on the 23d day of June, 1931, I executed a certificate as District Judge in the case of Vivian F. Baldwin and E. R. Baldwin, Plaintiffs, vs. Ed Anderson and American Surety Company of New York, a Corporation, Defendants, pending in the District Court of the Third Judicial District of the State of Idaho, in and for the County of Ada; which said certificate was filed in said District Court on the 30th day of June, 1931, and the statements contained in said certificate are true.

I further state that upon refreshing my recollection and after an examination of the original judgment of June 23, 1930, and my signature appearing thereon, that said judgment was signed by me in open court in the north courtroom in the Ada County courthouse. [142]

I further state that no wrong, false or fraudulent statements or representations were made to me by either of the attorneys for plaintiffs, Vivian F. Baldwin and E. R. Baldwin, at the time motion was made for judgment against the American Surety Company on June 23, 1930. I further state that no fraud was practiced upon the said District Court of the Third Judicial District, of the State of Idaho, in and for the County of Ada, or myself, as one of the Judges thereof, in the making of motion for judgment against the American Surety Company of New York, on the 23d day of June,

1930, or in obtaining my order granting the said motion, or in the entry of said judgment. I further state that no representations of any kind or character other than as set out in my certificate of June 23, 1931, filed June 30, 1931, were made to me by either of the plaintiffs' attorneys, or by any other person, in connection with said motion for judgment, my consideration thereof, or the granting thereof and entry of judgment pursuant thereto.

(Signed) CHARLES F. KOELSCH.

Subscribed and sworn to before me this 21st day of July, 1931.

[Seal of District Court, Third Judicial District, State of Idaho]

STEPHEN UTTER,
Clerk.
By Clyde B. Eagleson,
Deputy Clerk. [143]

[Title of Court and Cause.]

AFFIDAVIT OF JAMES F. AILSHIE, JR.

United States of America,
District of Idaho,
Southern Division,—ss.

James F. Ailshie, Jr., being first duly sworn, on oath deposes and says: That at all times hereinafter mentioned, I have been and now am a member of the Idaho Bar and as such have been one of the attorneys of record for plaintiffs in the case of Vivian F. Baldwin and E. R. Baldwin, Plaintiffs, vs. Singer Sewing Machine Company and Ed Anderson, Defendants; complaint in which was filed

in the District Court of the Third Judicial District of the State of Idaho, in and for the County of Ada, on or about March 1, 1928; that I have participated in all proceedings, including the proceedings had in the District Court for Ada County on the 23d day of June, 1930. That heretofore and on the 30th day of June, 1931, I made affidavit in opposition to a motion of the American Surety Company of New York to correct and vacate that certain judgment referred to in the bill of complaint in the above-entitled cause, entered by the District Court for Ada County, on the 23d day of June, 1930; which said affidavit was filed in said District Court of the Third Judicial District of the State of Idaho, in and for the County of Ada, on [144] the 30th day of June, 1931.

That on the date of signing this affidavit, I have read my affidavit of June 30, 1931, in full, and I now say that the statements therein contained are true. That I have read complainants' bill of complaint filed in the above-entitled cause and know the contents thereof.

I further state that no wrong, false or fraudulent statements or representations were made by myself or any other person at the time motion was made for judgment against the American Surety Company on June 23, 1930. I further state that no fraud was practiced upon the said District Court of the Third Judicial District of the State of Idaho, in and for the County of Ada, or upon the Hon. Charles F. Koelsch, as one of the Judges thereof,

in making motion for judgment against the said American Surety Company of New York, on the 23d day of June, 1930; or in the obtaining of the order of the court and of Hon. Charles F. Koelsch, the Judge who granted the same, or in the entry of said judgment.

I further state that no representations of any kind or character other than as set out in my affidavit of June 30, 1931, and the certificate of Hon. Charles F. Koelsch, certified copy of which is filed herein, were made by me or by any other person in my presence, to the said Hon. Charles F. Koelsch, in connection with said motion for judgment, the consideration thereof or the granting thereof and entry of judgment pursuant thereto.

JAMES F. AILSHIE, Jr.

Subscribed and sworn to before me this 21st day of July, 1931.

[Seal] W. D. McREYNOLDS,
Clerk.
By [Signature illegible],
Deputy. [145]

[Title of Court and Cause.]

AFFIDAVIT OF J. R. SMEAD.

State of Idaho,
County of Ada,—ss.

J. R. Smead, being first duly sworn, deposes and says that he is the identical person whose affidavit was filed in a proceeding in the District Court of

the Third Judicial District of the State of Idaho, in and for Ada County, which proceeding was had on a motion by defendant to amend and vacate the judgment of that court against defendant and in favor of plaintiffs in the case entitled Vivian F. Baldwin and E. R. Baldwin, Plaintiffs, vs. American Surety Company of New York, a Corporation, Defendant; that a certified copy of said affidavit is filed herein and herewith and affiant by this reference thereto incorporates herein said affidavit and deposes and says that the statements therein contained are true and correct.

J. R. SMEAD.

Subscribed and sworn to before me this 21st day of July, 1931.

[Seal] FERN B. JONES,
Notary Public for Idaho, Residence Boise, Idaho.

[146]

[Title of Court and Cause.]

AFFIDAVIT OF J. EMER HARRIS.

State of Idaho,
County of Ada,—ss.

J. Emer Harris, being first duly sworn, deposes and says that he is the duly appointed, qualified and acting deputy sheriff of Ada County, State of Idaho; that in such capacity there was delivered to him on June 17, 1931, a writ of execution duly issed out of, and under the seal of, the District Court of the Third Judicial District of the State of

Idaho, in and for the County of Ada, in the case of Vivian F. Baldwin and E. R. Baldwin, Plaintiffs, vs. American Surety Company of New York, a Corporation, Defendant, a true copy of which writ is hereto attached; that on the same day he served said writ on the duly elected, qualified and acting treasurer of the State of Idaho, who was by law the custodian of certain bonds belonging to the said American Surety Company of New York, and by notice of levy made on said treasurer, at the same time demanded that he deliver to the sheriff of Ada [147] County, State of Idaho, said bonds; that in response to said levy and demand, said treasurer on June 19th, 1931, delivered to me, as such deputy sheriff, the bonds described in the attached notice of sheriff's sale; that thereupon the said sheriff took the same into his custody by virtue of said writ, and thereafter, on June 25, 1931, there were duly posted in three public places in said county, notices of execution sale of said bonds, a true copy of which notice is here attached.

That on June 20th, affiant served on American Surety Company of New York a notice of said levy of said writ of execution, a true copy of which notice is also hereto attached, by mailing the same in the United States postoffice, securely sealed and addressed to said American Surety Company, No. 100 Broadway, New York City, with the necessary postage attached, which letter was registered and a return receipt requested, which return was thereafter received.

That by virtue of said writ of execution, issued by and out of the court aforesaid, there is now pending an execution sale of said bonds as commanded by said writ, for the purpose of satisfying the judgment entered in said cause and recited in said writ.

(Signed) J. EMER HARRIS.

Subscribed and sworn to before me this 21st day of July, 1931.

[Seal] FRANK J. KESTER,
Notary Public for Idaho.
Residence, Boise, Idaho. [148]

[Title of Court and Cause.]

AFFIDAVIT OF JAMES BRANDON.

State of Idaho.
County of Ada,—ss.

James Brandon, being first duly sworn, deposes and says that he is a duly appointed, qualified and acting deputy sheriff of Ada County, State of Idaho; that acting in said capacity, on June 25, 1931, in city of Boise, Ada County, State of Idaho, he served on O. O. Haga, as attorney at law and also as attorney-in-fact for American Surety Compny of New York, a true copy of the notice of levy of writ of execution attached to the affidavit of Emer J. Harris herein, by delivering the same to O. O. Haga personally in his office in the Idaho Building in said city of Boise.

(Signed) JAMES BRANDON.

Subscribed and sworn to before me this 21st day of July, 1931.

[Seal] FRANK J. KESTER,
Notary Public for Idaho,
Residence Boise, Idaho. [149]

[Title of Court and Cause.]

AFFIDAVIT OF JOHN McGRATH.

State of Idaho,
County of Ada,—ss.

John McGrath, being first duly sworn, deposes and says: That he is the duly elected, qualified and acting sheriff for the county of Ada, State of Idaho; that acting in the said capacity on June 24, 1931, he served on the duly appointed, qualified and acting Commissioner of Finance of the State of Idaho, by delivery of true copy thereof at his office in the state capitol, county of Ada, State of Idaho, the notice of levy of writ of execution attached to the affidavit of J. Emer Harris herein.

(Signed) JOHN McGRATH.

Subscribed and sworn to before me this 21st day of July, 1931.

[Seal] FRANK J. KESTER,
Notary Public for Idaho,
Residence Boise, Idaho. [150]

U. S. District Court, District of Idaho. Filed Jul. 21, 1931. W. D. McReynolds, Clerk. By ————, Deputy.

[Title of Court and Cause—No. 1626.]

MOTION TO DISMISS.

Come now the defendants and move the Court to dismiss the purported bill of complaint of the American Surety Company of New York, a corporation, heretofore filed in the above-entitled cause upon the following grounds:

I.

That the said bill of complaint does not state any facts sufficient to constitute a valid cause of action in equity, and does not set forth any facts to entitle complainant to the relief prayed or to any relief in equity.

II.

That the said bill of complaint is insufficient for want of equity and is insufficient to require defendants to answer thereto.

III.

That it appears upon the face of said bill that courts of the State of Idaho having jurisdiction to determine the issues set forth in complainant's bill of complaint acquired and exercised jurisdiction long prior to the filing [151] of said bill in the United States District Court for the District of Idaho, Southern Division, and it further appears from the face of said bill that the District Court of

the Third Judicial District of the State of Idaho in and for the county of Ada, a court created by the Constitution of the State of Idaho with original jurisdiction both at law and in equity, had at the time of the filing of said bill jurisdiction to hear a motion of complainant to amend and vacate the judgment of June 23, 1930, and had the same under advisement.

IV.

That it appears upon the face of said bill that prior to the filing of complainant's bill of complaint an execution pursuant to the judgment of June 23, 1930, had been issued out of the District Court of the Third Judicial District for the State of Idaho in and for the county of Ada, and placed in the hands of the sheriff of said county, and that said sheriff had duly and regularly levied upon certain securities belonging to complainant of the par value of $25,000.00 and had duly and regularly noticed the same for sale, to be held August 5, 1931, and that complainant's bill of complaint constitutes an attempt upon the part of complainant to stay proceedings of the District Court of the Third Judicial District of the State of Idaho in and for the county of Ada, and of the Supreme Court of the State of Idaho.

WHEREFORE, defendants pray that complainant's bill of complaint be dismissed and that defendants recover their costs and disbursements herein.

JAMES F. AILSHIE, Jr.,
J. R. SMEAD,
Attorneys and Solicitors for Defendants.
Residence and Postoffice Address: Boise, Idaho.

Service admitted this 21st day of July, 1931.

RICHARDS & HAGA,
MARTIN & MARTIN,
Attorneys for Plaintiffs. [152]

U. S. District Court, District of Idaho. Filed Jul. 21, 1931. W. D. McReynolds, Clerk. By ————, Deputy.

[Title of Court and Cause.—No. 1626.]

MOTION TO STRIKE.

Come now the defendants and move the court to strike from complainant's bill of complaint the following matters to wit:

I.

In Paragraph IX strike the following: " * * * which representations were wrong, false and fraudulent and were a fraud upon said District Court and upon the Honorable Charles F. Koelsch, one of the Judges thereof,"

II.

In Paragraph XII strike the following: "and said Supreme Court held in substance and effect that the application to the District Court for judgment on said undertaking presented a judicable inquiry, and that the District Court was without power or authority to vacate and set aside said judgment by a motion to vacate, and said Supreme Court of Idaho further held in said appeal that it

was without power to construe said undertaking on the appeal so taken by the defendants herein from the order vacating said judgment and that it could not on said appeal determine or construe said [153] undertaking or determine whether the District Court had jurisdiction of the person of plaintiff at the time said judgment (Exhibit 'C') was entered against this plaintiff, or whether said District Court had any power or authority to enter any judgment whatsoever against this plaintiff after said Singer Sewing Machine Company had been dismissed from said action."

III.

Strike all of Paragraph XIII.

IV.

Strike all of Paragraph XV except the following: "That * * * this plaintiff moved the said District Court of the Third Judicial District of the State of Idaho in and for Ada County to correct the recitals in said judgment * * * and said motion is now pending before said District Court undetermined and undecided."

V.

Strike from Paragraph XVIII the words "and the manner in which the same was obtained is and was a fraud upon this plaintiff and upon said District Court."

This motion is made and based upon the grounds that each of the foregoing parts, portions and para-

graphs of said bill of complaint is redundant, impertinent and scandalous.

JAMES F. AILSHIE, Jr.,
J. R. SMEAD,
Attorneys and Solicitors for Defendants.
Residence and Post Office Address: Boise, Idaho.

Service admitted this 21st day of July, 1931.
RICHARDS & HAGA,
MARTIN & MARTIN,
Attorneys for Defendants. [154]

U. S. District Court, District of Idaho. Filed Jul. 25, 1931. W. D. McReynolds, Clerk. By ————, Deputy.

[Title of Court and Cause—No. 1626.]

COUNTER-AFFIDAVIT OF McKEEN F. MORROW.

United State of America,
District of Idaho,
Southern Division,—ss.

McKeen F. Morrow, being first duly sworn, on his oath, deposes and says:

That he is a member of the firm of Richards & Haga, and that said firm of Richards & Haga, with Messrs. Martin & Martin, have been attorneys of record for the above-named plaintiff American Surety Company of New York in that certain action pending in the District Court of the Third Judicial District for the State of Idaho, in and for

Ada County, entitled: Vivian F. Baldwin and E. R. Baldwin vs. Ed Anderson and American Surety Company of New York, in which the judgment (Exhibit "C" to the bill of complaint herein) was entered, and that Messrs. Martin & Martin were attorneys for the Singer Sewing Machine Company, originally a defendant in said cause from the time Singer Sewing Machine Company appeared therein until said company was dismissed from said action, and that J. F. Martin is a member of said firm of Martin & Martin.

That about June 18 or 19, 1931, James F. Ailshie, Jr., one of the attorneys for defendants herein and one of the attorneys for plaintiffs in said suit in the state court above referred to, told affiant that when he, the said James F. [155] Ailshie, Jr., entered the courtroom of the Ada County District Court on June 23, 1930, he found that said J. F. Martin, a member of the firm of Martin & Martin, as aforesaid, was arguing a case before said Court, the Hon. Charles F. Koelsch presiding, and that he, the said James F. Ailshie, Jr., purposely waited until said J. F. Martin had left the courtroom before asking the Hon. Charles F. Koelsch, District Judge, to sign the judgment (Exhibit "C" to the bill of complaint herein). That the only purpose of said James F. Ailshie, Jr., in so waiting was to conceal from the said Singer Sewing Machine Company and its attorneys and its surety, plaintiff herein, any knowledge or information regarding said application for judgment.

That on August 12, 1930, the firm of Richards & Haga received from Hon. Charles F. Koelsch, Dis-

trict Judge, a memorandum opinion in said state court case of Vivian F. Baldwin and E. R. Baldwin vs. Ed Anderson and American Surety Company of New York determining the motion of said Surety Company, plaintiff herein, to vacate the judgment (Exhibit "C" to the bill of complaint herein); that said memorandum opinion is not part of the files in said cause and a true and correct copy of said memorandum opinion is hereto attached, marked Exhibit "A," hereby referred to and made a part of this affidavit.

That on the 4th day of May, 1931, the Supreme Court of Idaho in the case of Mountain States Implement Company, a Corporation, Respondent, vs. N. E. Arave et al., Defendants, and William Arave, Appellant, rendered a decision dismissing the appeal of William Arave and in the event that said decision becomes final it may have an important bearing upon the right of complainant herein to appeal to the Supreme Court of Idaho from the judgment entered June 23, 1930 (Exhibit "C" to the bill of [156] complaint herein). That thereafter within the time allowed by law, attorneys for appellant in said cause filed a petition for rehearing in the said Supreme Court of Idaho, which has not yet been disposed of and said decision has not yet become final nor has the same been reported. That a certified copy of the said decision of the Supreme Court is hereto attached, marked Exhibit "B," hereby referred to and made a part of this affidavit.

That on or about June 16, 1931, an order was entered by the Supreme Court of Idaho in the said

cause of Mountain States Implement Company vs. Arave allowing the attorneys for plaintiff herein ten days to file a brief *amici curiae* in said cause and said brief was filed June 26, 1931, and in said brief it was urged that the Court should grant a rehearing and deny the motion to dismiss said appeal.

That on or about July 1, 1931, an order was entered by the Supreme Court of Idaho in said cause of Mountain States Implement Company vs. Arave allowing the attorney for respondent in said cause and James F. Ailshie, Jr., the attorney for defendants herein and also attorney for plaintiffs in the said state court suit of Baldwin vs. Anderson and American Surety Company, thirty days from July 1, 1931, to file a brief in reply to the said brief of *amici curiae* in said cause.

That in the event the Supreme Court of Idaho should deny the petition for rehearing in said cause of Mountain States Implement Company vs. Arave and adhere to its original decision dismissing said appeal, there will be grave doubt as to the right of plaintiff herein, American Surety Company of New York, to obtain a hearing on the merits of the appeal taken by it on June 13, 1931, from the judgment of June 23, 1930 (Exhibit "C"). That Mr. Ailshie's only reason for filing the brief in said [157] Arave case is to obtain a decision which will enable defendants herein to have the said appeal of plaintiff dismissed by the Supreme Court and will thus enable them to avoid a hearing on the merits of said judgment of June 23, 1930, and also

to avoid having the Supreme Court of Idaho construe the undertaking (Exhibit "A" to the bill of complaint herein).

McKEEN F. MORROW.

Subscribed and sworn to before me this 25th day of July, 1931.

[Seal] H. M. JEFFREY,
Notary Public for Idaho,
Residence: Boise, Idaho.

Service of the above affidavit and receipt of a copy thereof, together with a copy of each of the exhibits therein referred to is hereby admitted this 25th day of July, 1931.

J. R. SMEAD,
JAMES F. AILSHIE, Jr.,
Attorneys for Defendants. [158]

EXHIBIT "A."

In the District Court of the Third Judicial District of the State of Idaho, in and for the County of Ada.

VIVIAN F. BALDWIN and E. R. BALDWIN,
Plaintiffs,

vs.

SINGER SEWING MACHINE COMPANY, a Corporation, and ED. ANDERSON,
Defendants.

MEMORANDUM OPINION.

Messrs. JAMES F. AILSHIE, Jr., and J. R. SMEAD, Attorneys for Plaintiffs,
MARTIN & MARTIN and RICHARDS & HAGA, Attorneys for Surety Company.

On March 1, 1928, the plaintiffs filed their complaint in this court against the defendants, asking for damages for alleged injuries to the person of the plaintiff Vivian F. Baldwin, as the result of being struck by an automobile driven by the defendant, Ed. Anderson, who, it is alleged was at the time an employee and agent of the defendant, Singer Sewing Machine Company, and allegedly engaged in his master's business at the time of the accident. The action was tried in May, 1928, before this Court and a jury, which found a verdict for the plaintiffs and against both defendants, in accordance with which verdict judgment was on May 31, 1928, entered for plaintiffs and against both defendants, for the sum of $19,500.00 and costs.

On August 27, 1928, the following notice of appeal was filed: [159]

> "You and each of you will please take notice that the defendant, Singer Sewing Machine Company, a corporation, and Ed. Anderson, hereby appeal to the Supreme Court of the State of Idaho, from that certain judgment entered in the above-entitled action on the 31st day of May, 1928, for the sum of $19,573.70

against the defendants, and each of them, and from the whole thereof.

Dated August 27, 1928.

MARTIN & MARTIN and
H. B. WALKER,
Attorneys for Defendants,
Residence: Boise, Idaho.

And on the 29th day of August, 1928, the said appellants filed an undertaking on appeal, in the penal sum of $300.00, with the American Surety Company of New York as surety.

On the same day the defendants jointly made application for an order directing the Reporter to make a transcript of the evidence and proceedings on the trial, and also filed a joint praecipe to the Clerk for a transcript of the designated files and papers. And, also on the said 29th day of August, 1928, there was filed a stay or supersedeas bond reading as follows:

(Title Court and Cause.)

Whereas the defendant, Singer Sewing Machine Company, a corporation, in the above-entitled action has appealed to the Supreme Court of the State of Idaho from the judgment made and entered against it in the above-entitled action and in the above-entitled court in favor of the plaintiffs in said action on the 31st day of May, 1928, for the sum of Nineteen Thousand Five Hundred ($19,-500.00) Dollars and for Seventy-three and 70/100 ($73.70) Dollars costs in said suit, making a total of Nineteen Thousand Five Hundred Seventy-three

and 70/100 ($19,573.70) Dollars, and from the whole of said judgment;

AND WHEREAS, the said appellant, Singer Sewing Machine Company, a Corporation, is desirous of staying the execution of said judgment so appealed from;

NOW, THEREFORE, the undersigned American Surety Company, a corporation, authorized to, and doing business in the State of Idaho, in consideration of the premises and of such appeal on the part of said appellant, Singer Sewing Machine Company, a corporation, does hereby acknowledge itself firmly bound in the sum of Twenty-five Thousand ($25,000.00) Dollars, gold coin of the United States, that if the said judgment appealed from, or any part thereof, be affirmed, or the appeal dismissed, the appellant will pay in gold coin of the United States [160] of America, the amount directed to be paid as to which said judgment shall be affirmed, if affirmed only in part, and all damages and costs which may be awarded against the appellant upon the appeal, and that if the said appellant does not make such payment within thirty days from the filing of the remittitur from the Supreme Court in the court from which the appeal is taken, judgment may be entered on motion of the respondents in their favor and against the undersigned surety for the said sum of Nineteen Thousand Five Hundred Seventy-three and 70/100 ($19,573.70) Dollars, together with the interest that may be due thereon and the damages and costs which may be

awarded against the said appellant, Singer Sewing Machine Company, upon the appeal.

IN WITNESS WHEREOF, the said American Surety Company, has caused its name and seal to be attached hereto by its proper officers and agents at Boise, Idaho, this 28th day of August, 1928.

AMERICAN SURETY COMPANY OF NEW YORK.

(Seal) By HOWARD E. STEIN,
Attorney-in-fact.

Countersigned:

HOWARD E. STEIN,
Agent at Boise, Idaho.

Countersigned:

RICHARDS & HAGA.
O. O. HAGA.

It is hereby agreed that the within bond is hereby accepted in so far as the amount is concerned without regard to it being double the amount of the judgment.

Dated at Boise, Idaho, this 29" day of August, 1928.

JAMES F. AILSHIE, Jr.,
J. R. SMEAD,
Attorneys for Plaintiffs.
Residence: Boise, Idaho.

The foregoing acceptance of said bond by the plaintiffs is endorsed thereon.

The Supreme Court rendered its opinion on the appeal, on April 10, 1930, reversing the judgment as to the defendant [161] Singer Sewing Machine Company, on the ground that though the de-

fendant Anderson was at the time of the accident an employee or agent of the Singer Sewing Machine Company, he was not at the precise time of the accident engaged in his master's business, but was acting for himself. The Court affirmed the judgment as against Anderson.

On the 24th day of May, 1930, in accordance with the remittitur from the Supreme Court, this Court made and entered its judgment that plaintiffs take nothing from the defendant Singer Sewing Machine Company, but that the latter have judgment against said plaintiffs for its costs in the Supreme and District Courts, amounting to over $500.01. And, on the 23d day of June, 1930, in pursuance of a motion by the attorneys for the plaintiffs reciting that the judgment against the defendant Ed. Anderson, had been affirmed, but that the same had not been paid, and that more than 30 days had elapsed since the filing herein of the remittitur from the Supreme Court, this Court entered judgment against both defendants, together with the costs allowed by the Supreme Court as against the defendant Anderson, in favor of the plaintiffs, and against the American Surety Company of New York, surety on the supersedeas bond hereinbefore set out.

On the 26th day of June, 1930, the said American Surety Company of New York, by its attorneys, served and filed the present motion, asking that the last-named judgment be vacated and set aside as null and void.

This motion is based upon the contention that the judgment against the Surety Company is void

for the reason that the said supersedeas bond was given only on the part of the defendant Singer Sewing Machine Company, and for the purpose of staying the execution of the original judgment against it, only, and not as a stay of said judgment as against the co-defendant Ed. Anderson.

The argument of counsel for the Surety Company is that under our statute (C. S. 7151), one or more of several judgment [162] debtors may appeal; that an appeal may be taken without a supersedeas or stay bond, and, hence, though two or more or all of several judgment debtors may appeal, execution of the judgment would be stayed only as to those putting up supersedeas bond or bonds, and not as to those, though appealing, who do not put up such stay bond or bonds. And, it is contended that the bond in question here shows on its face that it was put up as a stay of execution only as against the defendant Singer Sewing Machine, and, as the Supreme Court held the judgment against it erroneous, and reversed it, there is no breach of the condition of the bond and the surety is not liable.

The contention of the attorneys for the plaintiffs is that the bond stayed the execution as against both appellants; that the condition of the bond was that if the judgment be affirmed in whole or in part, the surety would pay whatever was affirmed; and that, as the judgment was affirmed in part, to wit: as to the defendant Ed. Anderson, which judgment has not been paid by Anderson, plaintiffs are entitled to judgment against the surety.

In support of this contention, plaintiffs' counsel

point to the fact that the original judgment was a joint judgment against both defendants; that the appeal therefrom was by a joint notice of appeal, in other words, was a joint appeal by both defendants; and that the application for an order for transcript, and the praecipe to the Clerk for his transcript, were all joint acts on the part of the defendants; and counsel for plaintiffs further point out that according to the preamble to the bond, the same was put up for the purpose "of staying the execution of the said judgment so appealed from," without qualification or limitation as to either appellant.

On these facts counsel argue that the bond stayed any execution of the judgment, and was, in fact and in law, a stay bond for or on the part of both appellants. [163]

Counsel for plaintiffs, to arrive at their conclusion that the surety is liable for the judgment as affirmed against the appellant Anderson, argue that "there can be but one execution issued upon a joint judgment," and that as the supersedeas bond stayed execution against the Singer Sewing Machine Company, it likewise stayed it against Anderson. In support of this conclusion counsel for plaintiffs quote from Miller vs. Pine Mining Co., 3 Idaho, 603, the following:

> "This execution should not have issued, as the proper bond was placed on file."

In that case there was but one appellant, and the bond was in the usual form, but the affidavit of qualification of the sureties was defective, in that

the notary had neglected to affix his signature. For this reason it was contended the bond was void, and did not prevent execution. The Court held that the affidavit was no part of the undertaking; that the bond was valid, and that execution should not have issued. Clearly the case is not applicable to the questions involved in the case at bar.

Plaintiffs also quote from the note on page 464 or 19 Ann. Cas., as follows:

> "Where judgment is rendered against several defendants jointly, the plaintiff is not entitled to have a separate execution issued against each of the defendants."

The note is appended to a case which holds that "The assignee of a part of a judgment will not be allowed to issue execution for so much of the judgment debt as was assigned to him."

In fact, a reading of the cases found in the annotation shows that they were all cases where attempts were made to divide a judgment into two or more parts, and to levy separate executions for each part. This the Courts uniformly hold should not be allowed, as that would unnecessarily harass a judgment creditor. But this is far from saying that but one execution may be issued to enforce a joint judgment. [164]

However, I do not understand plaintiffs' counsel to contend for a literal construction of the language that but one execution can issue to enforce a joint judgment. Nor do I understand that they contend that in all cases the staying of execution against one of several joint, or joint and several, judgment

debtors, necessarily stays it against all. For, on page 7 of their brief, they admit that "this situation cannot be compared with the situation which might be presented if a bond had been presented which merely stayed execution of a part of the judgment, for in that case the rule in Miller vs. Pine would perhaps not be applicable and the plaintiffs would be entitled to an execution although it could only be levied against the defendant as to whom the execution was not stayed, or as to such part of the judgment as was not stayed."

In other words, their contention resolves itself to this: that the wording of the present bond is such that it acted as a stay bond for both appellants.

And I agree that the crux of the question before me is to determine whether the language of the bond, considered in connection with the other steps on the appeal, particularly the joint notice of appeal, shows it to have been a stay bond on behalf of both appellants, or only for the appellant Singer Sewing Machine Co.

In support of the contention that the bond did stay any execution of this judgment, counsel for plaintiffs cite, as "a case most nearly in point," Thomas vs. Lee et al., (Wn.), 133 Pac. 446.

The question there arose on a motion to dismiss the appeal on the ground that while the appeal was a joint appeal of all the three defendants, the bond was signed by but two of the defendants as principals therein. The Court overruled that attack on the bond, basing its ruling on the case of Fidelity and Deposit Company of Maryland vs. Seattle R.

& S. Ry. Co., (Wn.) 97 Pac. 453, which latter case holds that "Under the statute as it now exists an appeal bond is sufficient if given on behalf of the appellant, when signed by the surety alone." (The underscoring is mine.) [165]

With this case as authority, the Court in the former case (Thomas vs. Lee), held that the omission of the name of one of the appellants as principal was immaterial, and found from the language of the bond that "the bond fairly indicates that it is given on behalf of all the appellants." The language quoted, and on which the Court apparently based its conclusion that the bond was given on behalf of all appellants, is: "if the above-named principals, D. H. and G. W. Lee, shall pay to A. F. Thomas * * * all costs and damages * * * and shall satisfy and perform the judgment or order appealed from in case it shall be affirmed, and any judgment or order which the Supreme Court may render or make * * *, then this shall be void" * * *, etc.

I do not consider this language nearly so parallel to the language of the bond in the present case, as the language of the bond in the California case of Bergevin vs. Wood, 105 Pac. 935, where the condition of the bond was that the surety promised "on the part of said appellant that said appellant will pay the amount of said judgment so appealed from and all costs, if the appeal is withdrawn or dismissed, or the amount of any judgment and all costs that may be recovered against him in the action in the said Superior Court." It was

held that the bond was in behalf of one only of the two defendants, though the preamble to the bond recited that: "Whereas the said defendants are dissatisfied with the said judgment, and are desirous of appealling therefrom to the Superior Court of the County of Amador, and pending such appeal claim a stay of proceedings and are desirous of staying the execution of the said judgment so rendered as aforesaid."

It will be noticed that the nouns and pronouns, and the verbs appearing in this preamble, are in the plural form, while in the condition of the bond they are in the singular.

In the bond under consideration in the case at bar, the nouns and pronouns referring to the appellant are all in the singular, and the verbs correspond therewith. Thus, in the preamble, it [166] is recited that "Whereas the defendant Singer Sewing Machine Company * * * has appealed * * * from the judgment made and entered against it," * * * "And, whereas the appellant Singer Sewing Machine Company, a corporation, is desirous of staying the execution of said judgment so appealed from";

This preamble says nothing about the appeal on the part of the defendant Ed. Anderson; it speaks only of the appeal by the Sewing Machine Company. It will also be noticed that it refers to the judgment as a "judgment made and entered against it." If this thought be kept in mind, it is logical to conclude that in the phrase expressing the desire

of staying execution of "said judgment," it likewise referred only to the judgment in so far as it concerned it, and it alone.

But thus far I have considered only the preamble, which after all, does not constitute the contract on the part of the surety. And while this preamble (as well as the notice of appeal, etc.) may be considered, and in case of doubt, might solve the doubt, the contract of the surety must be ascertained from the condition and the obligation of the bond. And here, the language of the bond under consideration is even more explicit in its limitation to the Singer Sewing Machine Company, as a single appellant:

> "Now therefore, the undersigned American Surety Company * * * in consideration of the premises, and of such appeal on the part of said appellant, Singer Sewing Machine Company * * * "acknowledges itself bound, etc., "that if the said judgment appealed from, or any part thereof, be affirmed, or the appeal dismissed, the appellant will pay * * * the amount directed to be paid as to which said judgment shall be affirmed, if affirmed only in part, and all damages and costs which may be awarded against the appellant upon the appeal, that if said appellant does not make such payment within 30 days * * * judgment may be entered * * * against the undersigned surety for the said sum of $19,573.70, together with interest that may be due thereon and the damages and

costs which may be awarded against the said appellant, Singer Sewing Machine Company." [167]

This language, it seems to me, is far more explicit than that found in the bond considered in Thomas vs. Lee, and more certain even than that contained in the bond considered in Bergevin vs. Wood. And, certainly, when construed in the light of the rule laid down by the cases that a surety is entitled to strict construction of his undertaking, the bond leaves no room for doubt that it was intended, and in effect, is, a bond only on behalf of the appellant Singer Sewing Machine Company.

The motion to declare the judgment void, and to set the same aside, will therefore be granted. Counsel for the Surety Company will prepare the proper order to this effect.

Dated August 11, 1930.

(Signed) CHARLES F. KOELSCH,
District Judge. [168]

EXHIBIT "B."

In the Supreme Court of the State of Idaho.

No. 5682.

Pocatello, March Term, 1931. Filed May 4, 1931. Clay Koelsch, Clerk.

MOUNTAIN STATES IMPLEMENT COMPANY, a Corporation,

Respondent,

vs.

N. E. ARAVE et al.,

Defendants,

and

WILLIAM ARAVE,

Appellant.

Appeal from the District Court of the Ninth Judicial District, for Bonneville County. Hon. C. J. Taylor, Judge.

Motion to dismiss appeal. Appeal dismissed.

OTTO B. McCUTCHEON, THATCHER & YOUNG, for Respondent.

CROWLEY & CROWLEY, for Appellant.

GIVENS, J.—December 20, 1929, the Clerk of the trial court entered on a jury's verdict, a judgment in favor of respondent. March 12, 1930, the court denied motions filed by defendants Arave, to vacate and set aside the verdict and judgment, but on his own motion, March 12, 1930, the same day,

entered an order vacating the judgment, which order on appeal (Mountain States Implement Co. vs. Arave, 49 Ida. 710, 291 Pac. 1074), was held unauthorized. There was heretofore no appeal from the original judgment. October 21, 1930, the trial court, remittitur in the above appeal having been filed October 16, 1930, vacated its former order and ordered the judgment of December 20, 1929, reinstated; an unnecessary and ineffective provision, since the judgment had never been dethroned. [169] October 21, 1930, the appeal herein was taken from the judgment, which appeal respondent moves to dismiss as filed too late.

We have carefully examined the more recent authorities passing upon this point, and the following cases hold that proceedings, ineffective as to the previous judgment, toll the statute during the time they are in operation, or being considered by the trial court: Rogers vs. Savage, (Wash.) 201 Pac. 768; In re German Ditch Co., (Colo.) 139 Pac. 2; Kamors vs. Kan. City Ry., (Mo) 202 S. W. 434; Scott vs. Rees, 253 S. W. 998 (Mo.); St. Clair vs. Conlon, 12 App. D. C. 161; So. Pac. vs. Sartoris, 27 Fed. (2d) 852.

The following authorities hold that such proceedings do not toll the statute: Miller vs. Prout, 32 Ida. 728, 187 Pac. 948; Walton vs. Clark, 40 Ida. 86, 231 Pac. 713; Boam vs. Sewell, 41 Ida. 718, 241 Pac. 1020; Pedigo vs. Fuller, (Wash.) 79 Pac. 1129; Hahn vs. Astoria National Bank, (Ore.) 125 Pac. 284; Spotton vs. Superior Court, (Cal.) 171 Pac. 801; In re Big Bend Irr. Dist., (Wyo.) 208

Pac. 872; First National Bank vs. Chowning, (Okla.) 218 Pac. 676; Burch vs. Smith, (Wyo.) 218 Pac. 791; Scott vs. Woodhams, (Colo.) 246 Pac. 1027; Western Land & Irr. Co. vs. Humfeld, (Ore.) 247 Pac. 143; Kline vs. Murray, (Mont.) 257 Pac. 465; Alvarado vs. Stanton, (Cal.) 267 Pac. 313; Oxford Tel. Co. vs. Ark. National Bank (Ark.) 204 S. W. 1140; Jowell vs. Lamb, (Tex.) 207 S. W. 987; Pearce vs. Peo. Sav. Bank, (Ark.) 238 S. W. 1063; Liberty Cent. Trust Co. vs. Roy, (Mo.) 245 S. W. 1085; Dent vs. Farmers' and Merchants' Bank, (Ark.) 258 S. W. 322; Beach vs. Beach, 145 N. Y. S. 409; Hild vs. McClintie Marshall Co., 215 N. Y. S. 88; Stamfer vs. Peter Hand Brewing Co., (Ind.) 118 N. E. 138; Wyant vs. Russel, (Ohio) 142 N. E. 144; Neighbors vs. Thistle Down Co., (Ohio) 159 N. E. 111; In re Slimmers Estate, (Minn.) 178 N. W. 954; In re Rocky Run Drainage Dist., (Wis.) 200 N. W. 384; Levine vs. Roth, (Pa.) 120 Atl. 115; U. S. vs. Fid. & Dep. Co., 155 Fed. 117; Collins Pav. Co. vs. Helseapple, (Ala.) 128 So. 599; [170] Bache & Co. vs. Locke, 86 Pa. Super. Ct. 501; Meadville Tel. Co. vs. Shafer, 94 Pa. Super. Ct. 246; Buckley vs. Sutton, 38 Mich. 1; Quinn Chapel A. M. E. Church vs. Pease, 66 Ill. App. 552; Marder Luse and Co. vs. Campbell Printing Co., 76 Ill. App. 431.

It must be kept in mind that the order vacating the judgment was void. In the case at bar, the court had no jurisdiction to issue the order setting aside the previous judgment. A void order is of no effect whatever. (Williams vs. Sherman, 36 Ida. 494 at 503, 212 Pac. 971; Johnson vs. Carrol, (Ky.)

228 S. W. 412; White vs. Hidalgo County Water Imp. Dist., 6 S. W. (2d) 790 (Tex.); Simmons vs. Hefter, (Ill.) 139 N. E. 404; People vs. Miller, (Ill.) 171 N. E. 672; In re Woolley's Estate, (Vt.) 117 Atl. 370; Hunt vs. Kennedy Coal Corp., (Va.) 124 S. E. 189; U. S. ex rel. Rauch vs. Davis, 8 Fed. (2d) 907.)

It is urged that a distinction is to be made in favor of appellant herein, by reason of the fact that the court entered the order of its own motion, not on appellant's motion. It is doubtful if much effect may be given such contention in the action herein, in view of the record, which shows that while the court entered this order on his own motion, it was on the very day he denied appellant's motion seeking the same thing. The authorities above cited, *pro* and *con,* do not appear, however, to take as the foundation for their ruling, action based on appellant's motion, rather than on the court' own initiative, reasoning that because the order, however prompted, is void, stands undisturbed, and the appeal therefrom, not in time, confers no jurisdiction on the appellate court, which, as to the last, was the express pronouncement in Miller vs. Prout, *supra,* at page 731:

> "This appeal not having been perfected within ninety days from the entry of the original judgment, conferred no judisdiction upon this court."

and in the same opinion, the court held that an appeal would lie [171] from the judgment which it was sought to vacate, while an appeal was pend-

ing from an order vacating such judgment, the court saying:

> "The proceeding under this statute is an independent proceeding and exists concurrently with the right of appeal from the judgment. Any order made pursuant to such a proceeding does not operate to extend the time for appeal from the judgment. The proper course is to appeal from the judgment if it is desired to have the judgment reviewed and to apply to the trial court for relief under this section, notwithstanding such appeal."

The order in the instant case was none the less void because made on the court's own motion.

It appears, therefore, by numerical weight and better reasoning, the authorities hold that a void order does not operate as a stay, or toll the statutory time for appeal.

> "The code provisions limiting the time in which to appeal are mandatory, and the time limited cannot be extended by the court, or by any circumstances, except by the pendency of proceedings on motion for a new trial." 2 Cal. Jur., § 171, p. 404.

The exception is provided for by special statute passed in 1915, and the doctrine is laid down in Leake vs. City of Venice, (Cal.) 185 Pac. 424. We do not have such a statute.

Where the order vacating the judgment is a nullity, the statute begins to run from the rendition

or entry of the judgment vacated. (3 C. J., § 1052, p. 1055.)

Appeal dismissed; costs to respondent.

Lee, C. J., and Varian J., concur. [172]

McNAUGHTON, J., Dissenting.—I am unable to concur with the majority opinion. As I understand the record the judgment was entered December 20, 1929. On February 6th the defendant moved to set aside the judgment. On March 12th this motion, treated as a motion for new trial, was denied. Thereupon the court took a hand and its own motion set aside the judgment and ordered a new trial. April 10th the plaintiff appealed from the order setting aside the judgment and granting a new trial. This order was reversed on appeal, and on October 21, 1930, on the remittitur, the original judgment was reinstated. Defendant on that day filed notice of appeal from the original judgment. We are confronted with a motion to dismiss the appeal from the judgment as filed too late.

The majority opinion, it seems to me, does not give sufficient consideration to the fact that the order setting aside the judgment was on the court's own motion. That is to say I fear the court treats this order as an order entered in a proceeding against the judgment. I say this because all of the long list of cases cited deal with orders entered in proceedings against the judgment. As stated in the opinion: " * * * the following cases hold that proceedings, ineffective as to the previous

judgment, toll the statute during the time they are in operation, or being considered by the trial court: * * * The following authorities hold that such proceedings do not toll the statute:" Here a long line of authorities are cited, headed by two opinions by this court, which announce or follow the doctrine that one may not extend the time in which to appeal by proceedings such as moving for a new trial, or moving against the judgment.

I do not think we should treat an order entered on the court's own motion as "a proceeding" against the judgment. [173]

I feel that C. S., sec. 7152, allowing 90 days in which to appeal, is for the benefit of the party feeling aggrieved by the judgment, and intends he shall have full 90 days in which to appeal the case, or at least in which to pursue that or some other remedy. In this case the judgment stood 83 days subject to appeal. Then it was vacated, not in a proceeding against it, but on the court's own motion, and a new trial was granted. After the error made by the trial court of its own motion was cleared from the record and the judgment was reinstated, in my opinion there remained 7 days in which to appeal.

A great many courts hold that proceedings in good faith against the judgment may extend the time in which to appeal. Many, I think a majority, and among them Idaho, hold such proceedings do not extend the time. I do not care to discuss the merits of either rule. Granting that one may not extend the time in which to appeal by motion for

a new trial or motion against the judgment or for modification of the judgment, still this case is not within that rule.

In the cases cited, in support of the rule under which they are cited, and in support of the decision in this case, the losing party instead of appealing chose a different course. If he did not have his full statutory time in which to appeal it was always because the time passed while the appellant was erroneously pursuing some other remedy. The worse any of the courts have done has been to deny the party additional time because his attorney consumed the time for appeal in pursuit of the wrong remedy.

In this case we are confronted with this situation, which is out of the ordinary: The trial court having denied a motion to vacate the judgment and grant a new trial, nevertheless on his own motion entered a void order to that very effect. Had the trial court, though he thought the judgment erroneous, stopped where the proceedings before him ended, the defendant would have had yet 7 days to appeal and correct error in the judgment, if any. This [174] error of the court interfering with the appeal can hardly be fairly charged to the litigant. It seems to me he should not be deprived of the remaining time to appeal by reason of it.

Some stress is placed in the majority opinion on the fact that this order vacating the judgment was void. I cannot think that materially alters the situation. I have found no case where lawyers were so astute in the practice as to appeal from a judgment which had been vacated and set aside

by a void order, nor have I found a court or text-writer willing to vouchsafe such an extraordinary proceeding. Theoretically, of course, a void order or judgment has no force, but practically, until supplanted, it has as much force as a valid one. The fellow in jail on a void judgment theoretically is a free man, but in reality he is in jail and must stay there until a better judgment is entered carrying out the theory. In Rogers vs. Savage, (Wn.) 201 Pac. 768, the Washington court held an order setting aside a judgment and granting a new trial, which was void because beyond the power of the court, suspended the right of or reason for an appeal from the judgment, and therefore suspended the time within which the appeal must be taken under Rem. Code 1915, sec. 1718. In the absence of any authority to the contrary, I very much doubt if the appellant in this case had a right to appeal from the vacated judgment. Certainly there was no apparent reason to do so. Until something further occurred in the proceedings he was hardly an aggrieved party.

Where an attorney erroneously pursues the wrong remedy during the ninety days allowed him for appeal, rights of the other party to a speedy determination of the litigation may require a holding that such proceedings are taken by the attorney at the client's peril. To thus hold the client responsible for the errors of his attorney seems to me quite all even-handed justice requires. To charge him also with the errors of the court appears [175] to me as extending the doctrine beyond any foundation. Mt. St. Imp. Co. vs. Arave.

BUDGE, J., Dissenting.—I concur in the views expressed in the dissenting opinion of Justice McNaughton. However, it seems to me that for the administration of even-handed justice the rule should be even more broadly stated than therein announced.

The question here for determination was decided by the Supreme Court of Washington, in Rogers vs. Savage, 201 Pac. 769, under a statute similar to C. S., sec. 7152; it being held (paragraph 1, syllabus):

> "An order setting aside a judgment and granting a new trial, which was void because beyond the power of the court, suspended the right of or reason for an appeal from the judgment, and therefore suspended the time within which the appeal must be taken under Rem. Code 1915, § 1718, so that the party against whom the judgment was rendered could appeal therefrom within the statutory time after reversal of the void order."

In the instant case the judgment was set aside by the trial court of its own motion, when there yet remained seven days in which to appeal from the judgment. From the order vacating the judgment an appeal was taken to this court. Upon due consideration this court held that the order of the trial court setting aside the judgment was void and directed the reinstatement of the judgment. The majority opinion holds that the statutory time for appeal began to run from the date of entry of the original judgment, and refuses to toll

it from the time the judgment was set aside until reinstated.

When the original judgment was set aside, as is said in the Washington case, *supra,* "there became nothing from which they could appeal, and, the court having made an order granting their motion for a new trial, all reason for appeal upon their part ceased."

Where the judgment is set aside on motion of one of the parties seeking relief therefrom, the rule announced in the [176] Washington case should be followed, since the right of or reason for appeal is then suspended, and the time for appeal should likewise be suspended until a superior court, when an appeal is taken, either reverses or affirms the order of the trial court.

In the majority opinion it is said in effect that, where upon an appeal from an order vacating a judgment the entry of such order is held to be without authority and the original judgment is reinstated, the order of reinstatement is but an idle act and ineffective for any purpose, since the original judgment erroneously set aside had never been dethroned. If not dethroned, it was certainly suspended and remained in abeyance until reinstated. In such circumstances no execution could issue, and it was as if no judgment had existed.

As I read the Idaho cases cited in the majority opinion, I do not think this precise question has been passed upon, and the cases are easily distinguishable from the present case. But, if an adopted rule of procedure works an injustice a court should not hesitate to correct it at the earliest opportunity.

I think the proper rule to be that the statutory period for appeal begins to run from the date of entry of the judgment, continuing to the time the judgment is set aside by the trial court, if that be done, then tolled pending disposition of any appeal from the order setting aside the judgment and until the remittitur is received directing reinstatement of the judgment, when the statutory period for appeal from the judgment is again put in motion. In other words, the aggrieved party should have altogether the full statutory time in which to appeal from the judgment. [177]

In the Supreme Court of the State of Idaho.

No. 5682.

MOUNTAIN STATES IMPLEMENT COMPANY, a Corporation,

Respondent,

vs.

N. E. ARAVE et al.,

Defendants, and

WILLIAM ARAVE,

Appellant.

I, Clay Koelsch, Clerk of the Supreme Court of the State of Idaho do hereby certify that the annexed is a true and correct copy of the original opinion filed in the above-entitled cause on the fourth day of May, 1931, and now on file in my office.

WITNESS my hand and the seal of the court this twenty-fourth day of July, 1931.

(Seal) CLAY KOELSCH,
Clerk.

(Endorsed: Supreme Court, State of Idaho. Mountain States Implement Company, a Corporation, Respondent, vs. N. E. Arave et al., Defendants, and William Arave, Appellant. Certified Copy of Opinion.) [178]

U. S. District Court, District of Idaho. Filed Jul. 25, 1931. W. D. McReynolds, Clerk. By ————, Deputy.

[Title of Court and Cause—No. 1626.]

AFFIDAVIT OF CHARLES F. KOELSCH.

State of Idaho,
County of Ada,—ss.

Charles F. Koelsch, being first duly sworn, deposes and says: That he is one of the Judges of the District Court of the Third Judicial District of the State of Idaho and has been such Judge during all of the year 1931 and the Judge who has at all times handled all matters in connection with Civil Case No. 11,860 in said court in which Vivian F. Baldwin and E. R. Baldwin were Plaintiffs and Ed Anderson and American Surety Company of New York, a Corporation, were Defendants.

That he is the Judge who on June 30th, 1931, made a statement from the Bench in regard to the manner in which the judgment of June 23, 1930,

in favor of the plaintiffs herein and against the American Surety Company, was made and entered.

That said statement was taken by Frank J. Kester, official reporter of said court and was thereafter transcribed by him and certified to by him as such reporter on the 21st day of July, 1931.

That thereafter, at the request of the attorneys for the plaintiffs this affiant, as District Judge, made an order and certificate settling said transcript. [179]

That at about the middle of page 9 of said transcript so settled the following occurs:

> "The COURT.—How is that?
>
> General FRANK MARTIN.—Well, what time did your Honor leave the bench that day?
>
> The COURT.—About eleven o'clock, as I stated.
>
> General FRANK MARTIN.—That's what I wanted you to state.
>
> The COURT.—Yes, I didn't come back on the bench that day, unless that came up in the afternoon—but if that came up in the morning I did not again step up on the bench that day."

In the last above-quoted statement where the expression is used "unless that came up in the afternoon" this affiant, by the use of the word "that" referred to the criminal case referred to near the bottom of page 3 of said transcript and not to the case then under consideration of Vivian F. Baldwin and E. R. Baldwin, Plaintiffs, vs. Ed Ander-

son, and American Surety Company of New York, a Corporation, Defendants.

CHARLES F. KOELSCH.

Subscribed and sworn to before me, this 25th day of July, 1931.

[Seal] FRANK MARTIN, Jr.,
Notary Public for Idaho.
Residing in Boise, Idaho.

Service of the foregoing affidavit and receipt of copy admitted this 25th day of July, 1931.

JAMES F. AILSHIE, Jr.,
J. R. SMEAD,
Attorneys for Plaintiffs. [180]

U. S. District Court, District of Idaho. Filed Jul. 28, 1931. W. D. McReynolds, Clerk. By ————, Deputy.

[Title of Court and Cause—No. 1626.]

AFFIDAVIT OF JAMES F. AILSHIE, JR.

United States of America,
District of Idaho,
Southern Division,—ss.

James F. Ailshie, Jr., being first duly sworn, under oath, deposes and says:

That I have read the counter-affidavit of McKeen F. Morrow, which affidavit was subscribed and sworn to the 25th day of July, 1931.

That I have had frequent conversations with the said McKeen F. Morrow relative to the case of

Baldwin vs. American Surety Company and Ed Anderson.

That I did not state to said Morrow on or about June 18 or June 19, 1931, or at any other time, that I purposely waited in the morning of June 23, 1930, until J. F. Martin left the courtroom before making my motion for judgment against the American Surety Company. That as a matter of fact I stepped to the Bench immediately after the argument in the matter in which J. F. Martin was appearing was closed, which was the [181] first opportunity that I had to address the Court. That I do not know whether J. F. Martin had left the courtroom or not when said motion was made as I paid no attention to where he was or what he was doing, and I further state that at that time the firm of Martin & Martin did not to my knowledge appear as attorneys of record in any court for the American Surety Company of New York.

That I stated to said Morrow during the month of June, 1931, in the presence of J. R. Smead and Frank Martin, Sr., that I sat in the jury-box in the south courtroom of the Ada County courthouse the morning of June 23, 1930, and listened to an argument then being made before Honorable Charles F. Koelsch in which matter J. F. Martin appeared as one of the attorneys, and I further stated to said Morrow in the course of a general, casual conversation, in substance and effect that I rather smiled inwardly at the fact that J. F. Martin should be present at the time I was waiting my turn to make the motion for judgment against the American

Surety Company. I further state that I am advised that at the time said motion was made the firm of Martin & Martin were not attorneys for the American Surety Company and that therefore the said J. F. Martin would have had no right or authority to appear in connection with said motion even if I had especially asked him to remain.

I further state that the undertaking upon which the judgment was entered is countersigned:

"RICHARDS & HAGA
O. O. HAGA."

That by reason of said fact I went to the office of Richards & Haga shortly after the entry of said judgment of June 23, [182] 1930, and at said time and place stated to McKeen F. Morrow in substance and effect that they had executed a bond on behalf of the American Surety Company and that judgment had just been entered in the District Court of the Third Judicial District of the State of Idaho in and for the County of Ada in favor of Vivian F. Baldwin and E. R. Baldwin and against the said American Surety Company of New York, and that an execution had been issued pursuant thereto, and I then and there gave the said Morrow a copy of the said judgment and at his request furnished him with a copy of the said undertaking which some time before Mr. W. L. Phelps, who is the official court reporter for Judge Koelsch, had prepared for me.

I further state that there was never any effort made by me or by any other person at my direction, with my consent or to my knowledge to conceal the

said motion for judgment, and no inquiry was ever made of me by the American Surety Company or by McKeen F. Morrow or by any member of the firm of Richards & Haga to ascertain the status of said case until after the entry of judgment June 23, 1930, and no attempt or effort was made by the American Surety Company of New York to secure an adjudication of the question of its liability on that supersedeas undertaking until the said surety company filed its motion to declare the said judgment void June 26, 1930.

JAMES A. AILSHIE, Jr.

Subscribed and sworn to before me this 28th day of July, 1931.

[Seal] FERN B. JONES,
Notary Public for Idaho,
Residence: Boise, Idaho. [183]

U. S. District Court, District of Idaho. Filed Jul. 31, 1931. W. D. McReynolds, Clerk. By ————, Deputy.

[Title of Court and Cause—No. 1626.]

MEMORANDUM OPINION.

July 31, 1931.

RICHARDS & HAGA, McKEEN F. MORROW, MARTIN & MARTIN and FRANK MARTIN, Attorneys for Plaintiff.

JAMES F. AILSHIE, Jr., and J. R. SMEAD, Attorneys for Defendants.

CAVANAH, District Judge.—This is a bill for an injunction against the defendants and the sheriff of Ada County, Idaho, enjoining them from enforcing a judgment in favor of the defendants and against the plaintiff The American Surety Company, rendered by the state District Court. The case is before the court upon the pleadings and showing on motion for a temporary injunction which relates to a history of the proceedings surrounding the steps taken by the parties from the inception of the suit out of which the judgment arose to the time of the institution of this action. The particular proceeding in which the judgment was rendered was by motion for judgment on a supersedeas bond executed by the plaintiff under Section 7155 Idaho [184] Compiled Statutes, and which judgment the plaintiff asserts is unconscionable, inequitable and void and deprives it of its property without due process of law and denies it the equal protection of the law.

A federal court of equity is now asked to review those proceedings and by injunction stay further proceedings in the enforcement of the judgment. It presents the single question as to what extent does the power of the federal court extend when invoking its jurisdiction over proceedings had or pending in a state court, for the recognized principle will be kept in mind that if a state court has first assumed jurisdiction of the subject matter of the cause and the parties by reason of an action pending there, or that the matters in controversy have been determined by the state court having

jurisdiction of it and the parties, a federal court has no jurisdiction under the rule of comity of courts of concurrent jurisdiction to interfere with the jurisdiction of the court, or to review the merits of a controversy or annul the decrees of a court which had first obtained jurisdiction. Bearing then in mind this principle with the further thought that the federal courts accept as controlling the decisions of the highest court of the state when interpreting the statutes of the state, we are confronted with the inquiry here: Does the facts alleged in the bill and presented on the showing bring the present case under the principles thus stated?

It appears that in May, 1928, the defendant commenced an action in the state District Court against Ed. Anderson and the Singer Sewing Machine Company to recover damages for injuries alleged to have been sustained by Vivian F. Baldwin, and received a judgment against both Anderson and the Sewing [185] Machine Company in the sum of $19,500. An appeal was then taken to the Supreme Court of the state and the supersedeas bond for *$25,00* was given by the Sewing Machine Company in accordance with Section 7165 of the state statutes. Thereafter in April, 1930, the Supreme Court of the state rendered its decision in the cause and its remittitur went down to the trial court reciting that the judgment was reversed as to the Singer Sewing Machine Company and affirmed as to Anderson. The trial court then dismissed the cause as to the Sewing Machine Company, and after the expiration of thirty days from the time the remit-

titur was filed the Baldwins by their attorneys moved in court under sec. 7155, for the entry of a judgment against the plaintiff bonding company upon the supersedeas bond which was done by the court on June 23d, 1930. Three days thereafter the plaintiff moved the trial court to vacate the judgment which was granted on August 12th, 1930. An appeal was then taken from the order vacating the judgment by the defendants to the state Supreme Court, who in its decision reversed the order vacating the order and said:

> "Many assignments of error are made, but so far as this appeal is concerned we deem it necessary to consider only those which challenge the ruling of the lower court to the effect that the judgment against the surety company on the undertaking was void. * * *
>
> "We disclaim any intention or right to construe the legal effect of the undertaking in question further than to examine it in aid of determining the sole question of the court's jurisdiction to hear and determine the motion for judgment thereon.
>
> "The surety company did not claim error, and appeal. It did not claim inadvertence or mistake. It challenged the court's jurisdiction and moved to set aside the judgment as void. The whole question here is a question of jurisdiction. Nothing further. Nothing else. [186]
>
> "If a court has jurisdiction of the parties, jurisdiction of the subject matter, and jurisdiction of an issue of law or fact presented,

then its judgment upon that issue is not void whether erroneous or not. Such judgment in the absence of mistake or, in a proper case, motion for new trial, may be corrected only by appeal. * * *

"Regarding notice: Where a supersedeas undertaking for stay of execution is filed pursuant to C. S. sec. 7155, it is held the surety becomes a party to the action, and if the judgment stayed by the undertaking is affirmed in whole or in part and remains unsatisfied for thirty days, the judgment creditor may move in the action for judgment on the undertaking against the surety, and it is unnecessary to give the surety company notice of such motion. * * *

"In the case at bar the only question presented to the court was as to right to judgment on the bond which was presented to the court by appellants in the manner provided by statute for the submission of that issue. This challenged judicial inquiry.

"The question or issue presented was: Did the surety company, in its undertaking, become a party liable for every part of the judgment appealed from which might be affirmed by the Supreme Court, or did it stipulate only as to such judgment or part thereof as might be affirmed against the Singer Sewing Machine Company? To answer this question the court must look to the bond. The issue required a construction of the bond as a whole. The trial court had jurisdiction of this question. It construed the

bond in favor of appellants and against the surety company. It was not only in that court's power, but it was its duty, to decide the question submitted. * * * We think, regardless of what our construction of the bond might be, it cannot be said appellants held no right to submit the question. Nor can it be said that such submission was a fraud upon the court and on that ground its judgment was void.

"We find the trial court, upon the motion for judgment on the bond, had jurisdiction of the parties and jurisdiction of the subject-matter; that an issue was presented and it had jurisdiction to construe the undertaking and decide the issue which its judgment assumes to decide. It follows the judgment was not void, even if erroneous in the construction, and that the trial court committed error in annulling and vacating it as void." Baldwin et al. vs. Anderson et al. 299 Pac. 341. [187]

Since the decision of the Supreme Court plaintiff has taken appeals direct from the judgment and from an order denying the defendant Surety Company's motion to correct said judgment, which remain undisposed of. The statute, being section 7155, authorizing the entry of the judgment upon and undertaking on appeal has on many occasions been upheld as valid and not denying the surety of due process of law or equal protection of the law upon the theory that the surety becomes a party to the suit by its voluntary appearance made when

its supersedeas bond is filed, although notice is not given of the motion for the entry of the judgment after thirty days has elapsed from the date the primary judgment became final. Upon the primary judgment having become a final one and the conditions of the supersedeas bond having been broken the liability of surety is fixed and on motion as provided for in the statute summary judgment may be rendered on the bond. Pease vs. Rathbun-Jones Co., 243 U. S. 273; United States Fidelity & Guaranty Co. vs. Ft. Misery Highway Dist., 22 Fed. (9th C. C. A.) 369; Portland etc. Co. vs. Harley, (Ore.) 61 Pac. 346; Meridith vs. S. C. M. Co., 60 Cal. 617; Shannon vs. Dodge, (Colo.) 32 Pac. 61; United States Fidelity & Guaranty Co. vs. Ft. Misery Highway District, filed in this court of date February 21, 1927, unreported.

In proceedings to render such judgment the lower court had jurisdiction of the subject matter and the guaranty company. Toledo Scales Co. vs. Computing Scales Co., (C. C. A.) 281 Fed. 488; United States Fidelity & Guaranty Co. vs. Ft. Misery Highway Dist., *supra.*

Section 7152 of the statutes of the state gave to the plaintiff the same as every other litigant the right to appeal [188] from the judgment and to urge its contention as made here, the erroneous conclusion of the lower court as to the effect of the bond and of the judgment being void, which gave to it ample redress at law on the law side of the court. And, therefore, under the statutes of the state and the decisions of the Supreme Court,

plaintiff has had a plain, speedy and adequate remedy at law which precludes the invoking of the jurisdiction of a court of equity. Donovan et al. vs. Miller et al., 12 Ida. 601; Buzard vs. Houston, 119 U. S. 347. Nor is a court of equity open to the plaintiff because it failed to avail itself of its right of appeal from the judgment. Simonitsch vs. Bruce, 258 Fed. 331.

The contention that the judgment was entered by the trial court at Chambers and not in open court is untenable and not sustained by the record for the Trial Judge makes it clear in both his certificate and statement that it was entered in court.

The statute under which the judgment was entered being constitutional when applied to the plaintiff surety company, and the court having jurisdiction of both the subject matter and the plaintiff it would seem that the only remaining question is: Whether the judgment was obtained by fraud, accident or mistake unmixed with any fault or negligence of the plaintiff. The record seems to be silent as to any fact going to show that fraud was perpetrated upon the court in obtaining the rendition of the judgment. The allegation in the bill as to the obtaining of the judgment by fraudulent means is a conclusion and not a statement of fact showing what the fraudulent acts were. A bill for relief on the ground of fraud must be specific, and the facts constituting it must be stated, however the showing presented does not establish [189] any fraud of the conduct of counsel for defendants when he moved in open

court the entry of the judgment or thereafter, for it appears that he appeared in open court when the Judge was on the Bench and moved under the statute the entry of the judgment and tendered form of judgment to the Judge who after requiring authorities to be presented took the matter under advisement and thereafter entered the judgment, while there appears a sharp conflict between counsel as to whether the bond only secured the liability of the Sewing Machine Company, whom plaintiff asserts was the only principal in the bond for which it was surety, yet all the facts fall far short in establishing fraudulent conduct of counsel in obtaining the rendition of the judgment.

Finally the jurisdiction and right of a federal court of equity to restrain the enforcement of a judgment of a state court should not be exercised where it appears as here, that the judgment was rendered by the state court having jurisdiction of the subject matter and of the parties and that the same was not obtained by fraud, accident or mistake, and especially is that true after the highest court of the state had decided that the judgment was not void, but was rendered as authorized by the statutes and that there are still pending in the Supreme Court two appeals in which the same question submitted here is being urged. The fact that there appears a dispute as to whether the bond upon which the judgment was based covered the liability of the plaintiff goes to the merits of the case which the Supreme Court said was a judicial inquiry submitted to the trial court when the

judgment was entered. It is not in the power of a federal court to review the conclusion reached by the state court having first assumed jurisdiction upon a question which goes to the merits of the case, [190] although it may appear that such conclusion was erroneous. If such was not the rule then the doctrine of comity between courts could never prevail and confusion would exist between the decisions and processes of the federal and state courts.

These conclusions require the entry of an order sustaining the motions of the defendants to dismiss and strike and denying plaintiff's motion for a temporary injunction with costs. [191]

U. S. District Court, District of Idaho. Filed Aug. 1, 1931. W. D. McReynolds, Clerk. By ————, Deputy.

[Title of Court and Cause—No. 1626.]

ORDER DENYING AND OVERRULING MOTION FOR TEMPORARY INJUNCTION, ETC.

This cause came on to be heard on the 28th day of July, 1931, upon plaintiff's motion for temporary injunction and the motion of defendants to dismiss the bill of complaint and the motion of defendants to strike certain portions of the bill of complaint, Richards & Haga and Martin & Martin appearing as counsel for plaintiff, and James F. Ailshie, Jr., and J. R. Smead appearing

as counsel for defendants, and said motions were argued and submitted by counsel and the Court being fully advised in the premises, and in accordance with the written decision filed July 31, 1931:

IT IS HEREBY ORDERED AS FOLLOWS:

That plaintiff's motion for a temporary injunction be and the same hereby is denied and overruled.

That the motion of defendants to strike certain portions of the bill of complaint be and the same is hereby sustained and granted.

That the motion of defendants to dismiss the bill of complaint be and the same is hereby sustained and granted.

Dated this 1st day of August, 1931.

CHARLES C. CAVANAH,
Judge.

Service admitted this 1st day of August, 1931.

RICHARDS & HAGA,
MARTIN & MARTIN,
Solicitors for Complainant. [192]

U. S. District Court, District of Idaho. Filed Aug. 1, 1931. W. D. McReynolds, Clerk. By ————, Deputy.

In the District Court of the United States for the District of Idaho, Southern Division.

IN EQUITY—No. 1626.

AMERICAN SURETY COMPANY OF NEW YORK, a Corporation,

Complainant,

vs.

VIVIAN F. BALDWIN and E. R. BALDWIN,

Defendants.

DECREE.

On this 1st day of August, 1931, the above-named parties appearing in open court by their respective solicitors of record herein, and thereupon an order having been made and entered in open court sustaining and granting defendants' motion to dismiss the bill of complaint herein; and whereupon complainant by its said solicitors of record having refused to amend said bill or to otherwise plead further; and thereupon defendants having moved that a decree of dismissal be entered herein, which motion was granted,—

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED, that complainant's suit and bill of complaint herein be dismissed with prejudice, and that defendants recover their costs of and from the complainant taxed in the sum of $——.

Dated this 1st day of August, 1931.

CHARLES C. CAVANAH,
Judge. [193]

[Title of Court and Cause—No. 1626.]

AFFIDAVIT OF E. R. BALDWIN.

United States of America,
District of Idaho,
Southern Division,—ss.

E. R. Baldwin, being first duly sworn, deposes and says:

That he is one of the above-named defendants and that the other defendant is his wife; that it is not true, as stated in the affidavit for injunction pending appeal herein, that defendants are insolvent; that they have property which is of a value more than sufficient to pay their just debts and liabilities; that if the securities of complainant herein are sold on execution it will not be necessary to apply the proceeds of such sale in payment of debts of these defendants.

E. R. BALDWIN.

Subscribed and sworn to before me this 3d day of August, 1931.

JAMES F. AILSHIE,
Notary Public for Idaho.
Residence: Boise, Idaho. [203]

Filed Aug. 4, 1931. Stephen Utter, Clerk. By Thos. E. Powell, Deputy.

U. S. District Court, District of Idaho. Filed Aug. 4, 1931. W. D. McReynolds, Clerk. By ————, Deputy.

In the District Court of the Third Judicial District of the State of Idaho in and for the County of Ada.

VIVIAN F. BALDWIN and E. R. BALDWIN,
Plaintiffs,

vs.

ED ANDERSON and AMERICAN SURETY COMPANY OF NEW YORK, a Corporation,
Defendants.

STIPULATION CONTINUING SALE OF CERTAIN SECURITIES OF AMERICAN SURETY COMPANY.

It is hereby stipulated between counsel for the respective parties hereto that the sale of certain securities belonging to the American Surety Company of New York and deposited by it with the treasurer of the State of Idaho and levied upon by the sheriff of Ada County pursuant to a writ of execution issued in the above-entitled action on the 17th day of June, 1931, which said securities have heretofore been noticed for sale to be held at the hour of ten o'clock A. M. on the 5th day of August, 1931, shall be continued to the hour of ten

o'clock A. M. Friday, the 14th day of August, 1931.

This stipulation is made by all parties without waiver of any rights on behalf of any of them except as to the continuance of said sale. [208]

Dated this 4th day of August, 1931.

JAMES F. AILSHIE, Jr.,
J. R. SMEAD,
Attorneys for Plaintiffs.
RICHARDS & HAGA,
MARTIN & MARTIN,
Attorneys for Defendant American Surety Company.

ORDER POSTPONING AND CONTINUING SHERIFF'S SALE OF CERTAIN SECURITIES OF AMERICAN SURETY COMPANY.

Pursuant to the foregoing stipulation, IT IS HEREBY ORDERED that the sheriff's sale of certain securities of the American Surety Company of New York, heretofore noticed by the sheriff of Ada County, Idaho, for August 5th, 1931, be and the same hereby is postponed and continued to the 14th day of August, 1931, at ten o'clock A. M.

CHARLES E. WINSTEAD,
District Judge.

State of Idaho,
County of Ada,—ss.

I, Stephen Utter, Clerk of the District Court of the Third Judicial District of the State of Idaho,

in and for the County of Ada, do hereby certify that the foregoing is a true and correct copy of the original stipulation and order filed in the above-entitled action and remaining now on file in my office at Boise City, Ada County, Idaho.

GIVEN under my hand and the seal of said court at office in Boise City, Ada County, Idaho, this 4th day of August, 1931.

[Seal] STEPHEN UTTER,
Clerk.
By Thos. E. Powell,
Deputy. [209]

U. S. District Court, District of Idaho. Filed Aug. 5, 1931. W. D. McReynolds, Clerk. By ————, Deputy.

[Title of Court and Cause.]

PETITION FOR APPEAL.

American Surety Company of New York, plaintiff herein, considering itself aggrieved by the final decree of this Court made and entered herein on the 1st day of August, 1931, dismissing plaintiff's bill and the above-entitled suit, and also by that certain order made and entered in this cause on the 1st day of August, 1931, denying plaintiff's motion for a preliminary injunction, hereby appeals from said decree and order and from each and every part thereof, to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the assignment of errors

filed herewith, and your petitioner prays that this appeal may be allowed and that citation issue as provided by law and that a transcript of the record, proceedings and papers on which said decree and order were made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

Your petitioner further shows that it sought by its said bill of complaint and by its motion for a preliminary injunction to restrain and enjoin the said defendants and each of them, and those acting for them or in their behalf, from collecting or attempting to collect a certain judgment described in the bill of complaint and made and entered on or about the 23d day of June, 1930, in favor of the said [210] defendants and against the said plaintiff, for the principal sum of $22,357.21, together with interest and costs, which judgment was made and entered by the District Court of the Third Judicial District of the State of Idaho, in and for Ada County, and to enjoin and restrain the said defendants and those acting for them or in their behalf, from selling or attempting to sell under an execution issued upon said judgment certain securities, the property of this plaintiff, and consisting of $25,000.00 par value of United States Fourth Liberty Loan Bonds bearing interest at the rate of 4¼% per annum, which bonds your petitioner had deposited with the state treasurer of the State of Idaho under Section 5104 of the Compiled Statutes of Idaho 1919, for the purpose of qualifying this plaintiff

to carry on and do the business of a surety company in said state.

That because of the insolvency of the said defendants and each of them, and the proceedings now pending for the sale of said securities under such execution as set forth in the bill of complaint and in the affidavit of McKeen F. Morrow filed August 3, 1931, and hereby referred to and made a part hereof, the subject matter of this litigation will be wholly destroyed during the pendency of plaintiff's appeal and plaintiff will be effectually denied and deprived of its right of appeal from said order and decree, unless the said defendants and those acting for them or in their behalf or under their direction in the matter of making said sale and attempting to collect said judgment, be so enjoined and restrained from proceeding with said sale and from collecting or attempting to collect said judgment during the pendency of said appeal.

Your petitioner further shows that while the sale of said securities under said execution was originally set for the 5th day of August, 1931, at 10:00 o'clock A. M., such sale [211] has been postponed until the 14th day of August, 1931, at 10:00 o'clock A. M., at which time your petitioner is advised and so alleges the sale will be made, unless the said parties be restrained or enjoined as herein prayed.

That plaintiff offers to do equity and to furnish a good and sufficient bond by the Fidelity and Deposit Company of Maryland as surety (a corporation duly licensed and authorized to do busi-

ness as a surety company in the State of Idaho), to indemnify the said defendants and each of them against all loss, costs and damages that may be sustained by the defendants by reason of any such order restraining and enjoining the sale of said securities and the collection of said judgment during the pendency of said appeal, or a bond conditioned as the Court may deem proper for the protection of said defendants.

Your petitioner's application for such restraining order and injunction during the pendency of this appeal is based on the records and files in this action and upon the said affidavit of McKeen F. Morrow.

Your petitioner therefore further prays that an injunction or restraining order or an order in the nature of a supersedeas be issued, made and entered herein pending the final disposition of the cause and to preserve and protect the subject-matter of the litigation during the pendency of said appeal, and that the amount of the bond or securities to be furnished by your petitioner may be fixed by the order allowing this appeal.

Dated this 5th day of August, 1931.

RICHARDS & HAGA,
OLIVER O. HAGA,
McKEEN F. MORROW,
MARTIN & MARTIN,
FRANK MARTIN,
Solicitors for Plaintiff,
Residence: Boise, Idaho. [212]

U. S. District Court, District of Idaho. Filed Aug. 5, 1931. W. D. McReynolds, Clerk. By ————, Deputy.

[Title of Court and Cause—No. 1626.]

ASSIGNMENT OF ERRORS.

Now comes the American Surety Company of New York, plaintiff herein, by its solicitors, and, having presented an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the decree made and entered herein on the 1st day of August, 1931, dismissing plaintiff's bill of complaint and its suit and from the order made on said 1st day of August, 1931, denying plaintiff's motion for a preliminary injunction in this cause and striking certain portions of plaintiff's bill of complaint, says that said decree and order are erroneous and unjust to plaintiff, and particularly in this:

1. Because the Court erred in dismissing plaintiff's bill of complaint herein and its said suit.

2. Because the Court erred in making and entering a decree dismissing plaintiff's bill and suit with prejudice.

3. Because the Court erred in considering the matters set forth in defendant's showing in opposition to the motion for temporary injunction upon their motion to dismiss.

4. Because the Court erred in holding and deciding that the bill of complaint did not set forth any facts to entitle plaintiff to the relief prayed for, or to any equitable relief. [213]

5. Because the Court erred in holding and deciding in effect that the said judgment of the District Court of Ada County entered June 23, 1930, and the enforcement of which plaintiff sought to enjoin and restrain, did not deprive plaintiff of its property without due process of law, contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States.

6. Because the Court erred in holding and deciding that an injunction, preliminary until final hearing in this cause should not issue, as prayed in said complaint.

7. Because the Court erred in refusing plaintiff a preliminary injunction, pending final hearing in this cause, restraining the above-named defendants, their agents, attorneys and assigns, from enforcing the collection of the above-mentioned judgment of June 23, 1930, and from selling or attempting to sell under execution issued upon said judgment the bonds and securities of the par value of $25,000.00 belonging to plaintiff and deposited with the state treasurer of the State of Idaho for the purpose of qualifying plaintiff to carry on the business of a surety company in said state.

8. Because the Court erred in sustaining the motion of defendants to strike from the bill of complaint in this cause certain portions specified in defendants' said motion and from striking from said complaint any matter whatsoever.

9. Because the Court erred in holding and deciding in effect that the issuance and levy of execution prevented injunctive relief in this suit.

10. Because the Court erred in holding and deciding in effect that the said judgment of June 23, 1930, was not void for lack of jurisdiction of the person of this plaintiff, American Surety Company of New York.

11. Because the Court erred in holding and deciding [214] in effect that the said judgment of June 23, 1930, was not void for want of power of said Court to give the judgment rendered against this plaintiff.

12. Because the Court erred in not holding and deciding that the said judgment of June 23, 1930, was unconscionable and inequitable and that the enforcement thereof should be enjoined and restrained and plaintiff afforded an opportunity to present its defense thereto prior to the entry of such judgment.

13. Because the Court erred in not holding and deciding that the entry of said judgment of June 23, 1930, was procured by constructive or legal fraud upon the plaintiff and upon the Court that entered said judgment.

14. Because the Court erred in holding and deciding in effect that this suit was an attempt to secure a review of judicial errors made or claimed to have been made by the Supreme Court of the State of Idaho and by the District Court of said State that entered said judgment.

15. Because the Court erred in holding and deciding in effect that actual fraud, accident or mistake were necessary conditions to relief in equity against the enforcement of the said unconscionable

and inequitable judgment obtained against plaintiff wholly without any fault or negligence on its part.

16. Because the Court erred in holding and deciding that it was prevented by the principals of comity between courts from granting the injunction prayed for, or any other equitable relief in this suit.

17. Because the Court erred in holding and deciding that plaintiff's bill should be dismissed for the reason that plaintiff had a plain, speedy and adequate remedy at law.

18. Because the Court erred in holding and deciding [215] in effect that plaintiff had an adequate remedy by appeal from said judgment of June 23, 1930.

19. Because the Court erred in not holding and deciding that said judgment of June 23, 1930, was void for the reason that the same was entered at Chambers and not in open court.

20. Because the Court erred in holding and deciding that the District Court for Ada County had jurisdiction to enter the judgment of June 23, 1930, in favor of defendants and against plaintiff herein.

WHEREFORE, plaintiff prays that said decree of August 1, 1931, be reversed and set aside and that the said order denying plaintiff's motion for a preliminary injunction and striking from plaintiff's bill of complaint the portions thereof particularly set out in defendants' motion to strike be likewise annulled, reversed and set aside, and that the District Court be directed to proceed with the

cause and to grant a preliminary injunction until final hearing.

RICHARDS & HAGA,
OLIVER O. HAGA,
McKEEN F. MORROW,
MARTIN & MARTIN,
FRANK MARTIN,
Solicitors for Plaintiff.
Residence: Boise, Idaho. [216]

U. S. District Court, District of Idaho. Filed Aug. 5, 1931. W. D. McReynolds, Clerk. By ————, Deputy.

[Title of Court and Cause—No. 1626.]

ORDER ALLOWING APPEAL.

The petition of American Surety Company of New York, plaintiff in the above-entitled cause, for an appeal from the final decree made and entered herein on August 1, 1931, dismissing plaintiff's bill of complaint and suit and from the order made and entered on said date denying plaintiff's motion for a preliminary injunction and granting defendants' motion to strike certain portions of the bill of complaint, is hereby granted and the appeal allowed as prayed for, upon plaintiff filing a bond for costs on appeal in the sum of Five Hundred Dollars ($500.00), with good and sufficient sureties to be approved by the Court.

Plaintiff's petition for an order restraining and enjoining the defendants, their attorneys and agents,

from selling plaintiff's securities during the pendency of the appeal or collecting or attempting to collect the judgment entered against plaintiff on June 23, 1930, as prayed in the petition for appeal, is denied for the reasons stated in the memorandum opinion filed on August 5, 1931.

IT IS FURTHER ORDERED that a certified transcript of the record and all proceedings be transmitted to the Circuit Court of Appeals for the Ninth Circuit as required by law and the rules of this Court and of the Circuit Court of Appeals.

Dated this 5th day of August, 1931.

CHARLES C. CAVANAH,
District Judge. [217]

U. S. District Court, District of Idaho. Filed Aug. 5, 1931. W. D. McReynolds, Clerk. By ————, Deputy.

[Title of Court and Cause—No. 1626.]

BOND ON APPEAL.

KNOW ALL MEN BY THESE PRESENTS, that we, American Surety Company of New York, as principal, and Fidelity and Deposit Company of Maryland, as surety, are held and firmly bound unto the defendants named in the above-entitled cause in the just and full sum of Five Hundred and no/100 Dollars ($500.00), for the payment of which, well and truly to be made, we bind ourselves, and each of us, and our, and each of our, successors and assigns, firmly by these presents.

SEALED with our seals and dated this 5th day of August, 1931.

The condition of this obligation is such, that,

WHEREAS, the above-named American Surety Company of New York, plaintiff, has prosecuted an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from that interlocutory order and that certain decree, both made and entered in the above-entitled court and cause on the 1st day of August, 1931,—

NOW, THEREFORE, if the above-named plaintiff, American Surety Company of New York, shall prosecute its said appeal to effect and answer all costs if it shall fail to sustain its said appeal, then the above obligation shall be void; otherwise [218] the same shall be and remain in full force and virtue.

IN WITNESS WHEREOF, the said principal has caused its name to be hereunto subscribed by one of its attorneys of record, and the said surety has caused its name to be hereunto subscribed and its corporate seal affixed by its duly authorized agent and attorney-in-fact the day and year first above written.

AMERICAN SURETY COMPANY OF NEW YORK.

By RICHARDS & HAGA,

Attorneys of Record.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND.

By FRANK T. WYMAN,

Attorney-in-fact.

WALTER S. BRUCE,

Agent.

Countersigned:

[Seal] WALTER S. BRUCE
Resident Agent.

Approved.

CHARLES C. CAVANAH,
District Judge. [219]

U. S. District Court, District of Idaho. Filed Aug. 5, 1931. W. D. McReynolds, Clerk. By ————, Deputy.

[Title of Court and Cause—No. 1626.]

CITATION.

United States of America,
District of Idaho,—ss.

To Vivian F. Baldwin and E. R. Baldwin, GREETINGS:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, to be held in the city of San Francisco, State of California, within thirty (30) days from the date of this writ, pursuant to an appeal filed in the Clerk's office of the District Court of the United States for the District of Idaho, Southern Division, wherein American Surety Company of New York is appellant and you are appellees, to show cause, if any there be, why the order and decree in said appeal mentioned should not be corrected and speedy justice should not be done to the parties in this behalf.

WITNESS, the Honorable CHARLES C. CAVANAH, United States District Judge for the District of Idaho, this 5th day of August, A. D. 1931, and of the Independence of the United States the One Hundred and Fifty-sixth.

CHARLES C. CAVANAH,
District Judge.

[Seal] Attest: W. D. McREYNOLDS,
Clerk.
By Dorothy G. Wylie,
Deputy.

Service of the foregoing citation and receipt of a copy thereof is hereby admitted this 5th day of August, 1931.

JAMES F. AILSHIE, Jr.,
J. R. SMEAD,
Solicitors for Vivian E. Baldwin and E. R. Baldwin. [220]

U. S. District Court, District of Idaho. Filed Aug. 5, 1931. W. D. McReynolds, Clerk. By ————, Deputy.

[Title of Court and Cause—No. 1626.]

PRAECIPE FOR TRANSCRIPT OF RECORD.

To W. D. McReynolds, Clerk of the Above-entitled Court:

You are hereby requested to prepare a transcript of the record to be filed in the United States Circuit Court of Appeals for the Ninth Circuit, pursuant to the appeal of the above-named plaintiff taken in the

above-entitled cause from that certain order and that certain decree made and entered herein on the first day of August, 1931, such record to consist of the following:

1. Bill of complaint.
2. Motion for temporary injunction.
3. Stipulation, filed July 9, 1931.
4. Defendants' showing in opposition to motion for temporary injunction, consisting of a list of the various documents filed and certain papers filed therewith, designated by the Clerk as defendants' showing No. 1 to No. 4, inclusive, and being, respectively; No. 1, certified copy of printed transcript on appeal in the case of Vivian F. Baldwin and E. R. Baldwin, Plaintiffs, vs. Ed. Anderson and American Surety Company of New York, Defendants; No. 2, affidavits of Charles F. Koelsch and others, notice of levy on execution, notice of sheriff's sale, writ of execution, remittitur from Supreme Court of Idaho, and copy of opinion of Supreme Court of Idaho; No. 3, court reporter's transcript; No. 4, various [221] papers from the records and files of Case No. 11,860 in the District Court of the Third Judicial District of the State of Idaho, in and for the County of Ada.
5. Motion to dismiss.
6. Motion to strike.
7. Counter-affidavit of McKeen F. Morrow, with exhibits thereto attached, filed July 25, 1931.
8. Affidavit of Charles F. Koelsch, filed July 25, 1931.
9. Affidavit of James F. Ailshie, Jr., filed July 28, 1931.

10. Decision, filed July 31, 1931.

11. Order, filed August 1, 1931.

12. Decree, filed August 1, 1931.

13. Petition of plaintiff for an order to preserve the subject matter of the litigation pending appeal, and affidavit of McKeen F. Morrow in support of petition for injunction pending appeal, filed August 3, 1931.

14. Objections to application for injunction pending appeal, and affidavit of E. R. Baldwin, filed August 3, 1931.

15. Memorandum decision denying said petition.

16. Order denying said petition.

17. Certified copy of stipulation and order filed in State Court postponing sale, filed August 4, 1931.

18. All papers filed in connection with this appeal, to wit: Petition for appeal, assignment of errors, order allowing appeal, bond on appeal, citation, any stipulation filed herein as to the contents of the record, together with any additional files listed therein, and this praecipe, together with your certificate.

Said transcript to be prepared as required by law and the rules of this court and the rules of the United States Circuit Court of Appeals for the Ninth Circuit, and to be filed in the [222] office of the Clerk of said court as provided by law and the rules of this court and the Circuit Court of Appeals.

Dated this 5th day of August, 1931.

RICHARDS & HAGA,
MARTIN & MARTIN,
Solicitors for Plaintiff and Appellant.

Service of the above praecipe and receipt of a copy thereof is hereby admitted this 5th day of August, 1931.

JAMES F. AILSHIE, Jr.,
J. R. SMEAD,
Solicitors for Defendants and Appellees. [223]

U. S. District Court District of Idaho. Filed Aug. 7,. 1931. W. D. McReynolds, Clerk. By ————, Deputy.

[Title of Court and Cause—No. 1626.]

STIPULATION RE PRAECIPE AND WAIVING FILING OF COUNTER-PRAECIPE.

It is stipulated by and between counsel for the respective parties hereto that complainant's praecipe includes all of the records and files in the above-entitled cause, save and excepting the minutes of the court.

And it is further stipulated that in consideration of complainant's including in their record the Clerk's minutes of the proceedings had herein defendants waive the filing of a counter-praecipe.

RICHARDS & HAGA,
MARTIN & MARTIN,
Solicitors for Complainant.
JAMES F. AILSHIE, Jr.
J. R. SMEAD. [224]

CIVIL No. 1626.

AMERICAN SURETY COMPANY OF NEW YORK, a Corporation,

vs.

VIVIAN F. BALDWIN et al.

MINUTES OF COURT—AUGUST 1, 1931—TRIAL.

Comes now counsel for all of the parties hereto, appearing in open court, whereupon defendants moved the Court for the entering of orders sustaining motion to dismiss and motion to strike and denying complainant's motion for temporary injunction, which motion was by the Court granted and said orders duly signed and entered. Whereupon counsel for complainant waived time to further plead or amend their bill of complaint or to otherwise further plead, and thereafter counsel for defendants moved the Court to enter a final decree of dismissal, which motion was granted. [225]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

I, W. D. McReynolds, Clerk of the District Court of the United States for the District of Idaho, do hereby certify the foregoing transcript of pages numbered from 1 to 226, inclusive, to be full, true and correct copies of the pleadings and proceedings in the above-entitled cause, and that the same

together constitute the transcript of the record herein upon appeal to the United States Circuit Court of Appeals for the Ninth Circuit as requested by the praecipe of the plaintiff together with the stipulation filed by the respective parties.

I further certify that the cost of the record herein amounts to the sum of $35.00, and that the same has been paid by the appellant.

WITNESS my hand and the seal of said court this 7th day of August, 1931.

[Seal] W. D. McREYNOLDS,
Clerk. [227]

[Endorsed]: No. 6566. United States Circuit Court of Appeals for the Ninth Circuit. American Surety Company of New York, a Corporation, Appellant, vs. Vivian F. Baldwin and E. R. Baldwin, Appellees. Transcript of Record. Upon Appeal from the United States District Court for the District of Idaho, Southern Division.

Filed August 10, 1931.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals for the Ninth Circuit.

AMERICAN SURETY COMPANY OF NEW YORK, a Corporation,

Appellant,

vs.

VIVIAN F. BALDWIN and E. R. BALDWIN,

Appellees.

STATEMENT OF APPELLANT UNDER SUBDIVISION 8 OF RULE 23.

Comes now the above-named appellant and states that it intends to rely upon the errors specified in its assignment of errors included in the certified record herein, and further states that all of the record certified by the Clerk of the District Court of the United States for the District of Idaho, Southern Division is necessary for the consideration thereof except the following portions, to wit:

(a) Printed transcript in Supreme Court of Idaho, filed July 22, 1931, as Defendants' Showing No. 1, listed in appellant's praecipe as part of the documents specified in Paragraph 4.

(b) Petition of plaintiff and affidavit of McKeen F. Morrow, both filed August 3, 1931, listed in praecipe under Paragraph 13.

(c) Objections to application for injunction and affidavit of E. R. Baldwin, filed August 3, 1931, specified in praecipe under Paragraph 14.

(d) Memorandum decision denying said petition, specified in praecipe under Paragraph 15.

(e) Order denying said petition, specified in praecipe under Paragraph 16.

(f) Minutes of court, showing proceedings in this cause in the court below, included in record by stipulation of parties.

And pursuant to the provisions of said Rule 23 of this court, appellant requests that the papers and documents specifically listed above be omitted from the printed record on appeal herein, and further states that all of the papers and documents listed above are on file in the office of the Clerk of the United States District Court for the District of Idaho, Southern Division.

Dated this 14th day of August, 1931.

RICHARDS & HAGA,
MARTIN & MARTIN,
OLIVER O. HAGA,
Solicitors for Appellant.

Service of the above statement and receipt of a copy thereof is hereby admitted this 15th day of August, 1931.

JAMES F. AILSHIE, Jr.
J. R. SMEAD,
Solicitors for Appellees.

[Endorsed]: Filed Aug. 18, 1931. Paul P. O'Brien, Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

AMERICAN SURETY COMPANY OF NEW YORK, a Corporation,

Appellant,

vs.

VIVIAN F. BALDWIN and E. R. BALDWIN,

Appellees,

APPELLEES' DESIGNATION OF ADDITIONAL PORTIONS OF RECORD UNDER SUBDIVISION 8 OF RULE 23.

Come now the above-named appellees, and referring to the document on file herein entitled "Statement of Appellant Under Subdivision 8 of Rule 23" designate the further portions of the certified record filed herein from the United States District Court for the District of Idaho, as properly to be included as a part of the record to be considered by this court on the final hearing of this cause, to wit:

(1) The following from the printed transcript on appeal, filed in the Supreme Court of the State of Idaho in the case of Baldwin et al. vs. American Surety Company of New York et al., a copy of which printed transcript is listed in appellant's praecipe, Paragraph 4 thereof, as No. 1 of defendant's showing in opposition to temporary injunction in the lower court herein:

(a) "Judgment" in the original action of Bald-

win et al. vs. Singer Sewing Machine Company and Ed Anderson, in the state District Court, which judgment appears in said transcript on appeal at pages 5, 6 thereof.

(b) "Notice of Appeal" from said judgment designated in (a) last above, found on pages 6, 7 of said transcript on appeal.

(c) "Notice of Motion," found on pages 21, 22 of said transcript on appeal.

(d) "Motion," appearing on pages 22–24 of said transcript on appeal. (This designation of said "Motion" is intended to exclude Exhibit "A," appearing on pages 25–27 of said transcript, because the same is elsewhere included in this record.)

(e) "Affidavit," the same being an affidavit of McKeen F. Morrow, found on pages 27–29 of said transcript on appeal.

(f) "Minutes of Proceedings of the District Court of the Third Judicial District of the State of Idaho, in and for Ada County," for August 12, 1930, appearing at pages 31, 32 of said transcript.

(g) "Notice of Appeal," appearing at pages 34, 35 of said transcript.

(h) Certificate of correctness of said transcript on appeal to said Supreme Court of Idaho, which appears in said transcript as follows: Commencing with the last two lines on the bottom of page 38 of said transcript and continuing thence to include also pages 39–41 thereof.

(2) Affidavit of E. R. Baldwin, filed August 3, 1931, included in appellant's praecipe in Paragraph 14 thereof.

(3) Clerk's minutes of proceedings herein in United States District Court for the District of Idaho, for August 1, 1931.

Appellees further state that all of the papers and documents hereinabove designated were filed herein in the said United States District Court for the District of Idaho, are now on file in said District Court and that the same are included in the certified copy of the records of said District Court in this cause, which was heretofore filed in this court.

Dated this 19th day of August, 1931.

JAMES F. AILSHIE, Jr.,
J. R. SMEAD,
Attorneys and Solicitors for Appellees.
Residence: Boise, Idaho.

Service of this above and foregoing designation, and receipt of a copy thereof, is hereby acknowledged this 19th day of August, 1931.

RICHARDS & HAGA,
MARTIN & MARTIN,
OLIVER O. HAGA,
Attorneys for Appellant.

[Endorsed]: Filed Aug. 22, 1931. Paul P. O'Brien, Clerk.

No. 6566

United States

Circuit Court of Appeals

For the Ninth Circuit.

AMERICAN SURETY COMPANY OF NEW YORK, a Corporation,

Appellant,

vs.

VIVIAN F. BALDWIN and E. R. BALDWIN,

Appellees.

Upon Appeal from the District Court of the United States for the District of of Idaho, Southern Division.

PROCEEDINGS HAD IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

In the Circuit Court of Appeals for the Ninth Circuit.

AMERICAN SURETY COMPANY OF NEW YORK, a Corporation,

Appellant,

vs.

VIVIAN F. BALDWIN and E. R. BALDWIN,

Appellees.

PETITION FOR ORDER TO PRESERVE THE SUBJECT MATTER OF THE LITIGATION PENDING APPEAL.

Appellant petitions this Honorable Court, and shows:

1. That on the 5th day of August, 1931, it perfected an appeal herein to the Circuit Court of Appeals for the Ninth Circuit from the United States District Court for the District of Idaho, Southern Division, under section 128 of the Judicial Code as amended (Sec. 225, Title 28, U. S. Code), and under section 129 of the Judicial Code as amended (Sec. 227, Title 28, U. S. Code), from a final decree dismissing appellant's bill of complaint against the said appellees and from an order denying appellant's motion for a preliminary injunction restraining the defendants, their agents, attorneys and assigns, and all acting under them or in their behalf, from collecting or attempting to collect during the pendency of the suit a certain judgment hereinafter more particularly described, and from selling or attempting to sell certain securities, the property

of appellant, of the par value of $25,000.00, deposited by appellant with the Treasurer of the State of Idaho pursuant to section 5104 of the Compiled Statutes of Idaho 1919, in order to qualify appellant to carry on its business as a surety company in said state.

2. That in its petition for appeal from said decree and order, appellant petitioned the said District Court and the Judge thereof to issue an order restraining the said appellees, as aforesaid, during the pendency of said appeal, in order that the subject matter of the litigation might be preserved and kept intact until the final disposition of the cause in this court, but the said District Court, conceiving itself to be without jurisdiction or power to issue such restraining order during the pendency of said appeal, allowed said appeal and approved appellant's bond for costs in the sum of $500.00, but refused and declined to issue any order protecting the subject matter of the litigation during the pendency of the appeal and restraining and enjoining the defendants, their agents, attorneys and assigns and others acting for them or in their behalf from attempting to collect the said judgment or from selling or attempting to sell on execution appellant's securities so deposited with the State of Idaho as aforesaid, all of which more fully appears from the memorandum decision filed by the Judge of said court on August 5, 1931, and made a part of the record submitted herewith.

3. That for the reasons aforesaid your petitioner is compelled to apply to this Honorable Court and

the Judges thereof for said order so restraining and enjoining the defendants, their agents, attorneys and assigns, and for the preservation of the subject matter of the litigation during the pendency of said appeal.

4. That, briefly stated, the facts upon which said suit is based are as follows:

(a) That on or about the 31st day of May, 1928, the said Vivian F. Baldwin and E. R. Baldwin recovered a judgment in the District Court of the Third Judicial District of the State of Idaho, in and for Ada County, against one Ed Anderson and Singer Sewing Machine Company, a corporation, in the sum of $19,500.00, and costs of action.

(b) That thereafter and about the 27th day of August, 1928, the said Ed Anderson and the said Singer Sewing Machine Company, through their respective attorneys, appealed from said judgment to the Supreme Court of the State of Idaho; that said Anderson gave an undertaking for costs only on said appeal, but the said Singer Sewing Machine Company, being desirious of staying all proceedings against it on said judgment pending the determination of said appeal, applied to appellant, American Surety Company of New York, for a supersedeas bond or undertaking on said appeal in the sum of $25,000.00, to be executed for and on behalf of said Singer Sewing Machine Company, but not on behalf of the said Anderson.

(c) That in accordance with the request of said Singer Sewing Machine Company, this appellant executed such bond for the sole benefit of said Singer Sewing Machine Company and for the sole

purpose of staying proceedings against said Singer Sewing Machine Company on said judgment pending said appeal.

(d) That thereafter and about the 10th day of April, 1930, the Supreme Court of the State of Idaho rendered its decision in said appeal and held, as shown by the decision of said court reported in 49 Idaho Reports, pages 231 to 339, inclusive, that said Singer Sewing Machine Company was not liable to the said Vivian F. Baldwin and E. R. Baldwin, and the judgment as against said Company was set aside with costs in its favor, and the said Singer Sewing Machine Company was thereafter, to wit: On the 24th day of May, 1930, by the said District Court of the Third Judicial District of the State of Idaho, dismissed from said suit, and judgment entered in its favor against the appellees herein for costs in the sum of $488.55.

(e) That thereafter, to wit: On June 23, 1930, said District Court or the Judge thereof at Chambers, at the request of one of the attorneys for the appellees herein, but without any notice to appellant, entered judgment against appellant on said bond for the sum of $22,357.21, because of the failure or default of said Ed Anderson to pay the said judgment so obtained against him by appellees but which had been set aside and vacated as against the said Singer Sewing Machine Company, in whose behalf said bond was given.

(f) That thereafter and on the 12th day of August, 1930, said District Court of the Third Judicial District of the State of Idaho, in and for

Ada County, vacated and set aside the judgment so entered against appellant on the ground and for the reason that said appellant was not surety for said Ed Anderson and was not liable under said bond for his default or failure to pay said judgment.

(g) That an appeal was thereafter taken from said order so vacating and setting aside said judgment by the appellees herein to the Supreme Court of the State of Idaho, and thereafter on the 2d day of May, 1931, the Supreme Court of the State of Idaho reversed said order so made on the 12th day of August, 1930, by said District Court vacating and setting aside said judgment on the ground that said District Court was without power or authority to vacate and set aside said judgment by motion to vacate, and that appellant's remedy was not by motion to vacate, but by appeal from said judgment, and said Supreme Court held that it was without power to construe said undertaking or bond on the appeal so taken from the order vacating said judgment and declined to determine whether said judgment against appellant had been legally or properly taken and whether judgment could be entered against appellant on said undertaking because of the default or failure of said Ed Anderson to pay said judgment.

(h) That thereafter a petition for rehearing was filed by appellant and denied by said Supreme Court on or about the 2d day of June, 1931, and the remittitur of said Supreme Court filed in said District Court on June 3, 1931.

(i) That thereafter and on June 17, 1931, appellees caused execution to issue upon said judgment and caused said execution to be levied upon $25,000.00, par value, United States Fourth Liberty Loan Bonds bearing 4¼% interest, long prior thereto deposited by appellant with the Treasurer of the State of Idaho for the purpose of qualifying appellant to do and carry on a surety business in said state; that such execution was placed in the hands of the sheriff of Ada County at the direction of the attorneys for appellees, and said sheriff noticed said securities for sale on the 5th day of August, 1931, at 10:00 o'clock A. M. at the front door of the courthouse in Boise, Ada County, Idaho; that said sale has since been postponed to 10:00 o'clock A. M., August 14, 1931.

(j) That the proceeds from the sale of said securities will, as appellant is informed and believes and so alleges the fact to be, be paid over to appellees herein and applied by them in satisfaction of the judgment which said appellees hold against said Ed Anderson, and such money will be disbursed by appellees and paid out to their creditors and otherwise spent and disposed of.

(k) That appellees are insolvent and this appeal will be wholly ineffectual and futile if the said securities be sold on the 14th day of August, 1931, as now proposed by appellees, or at any time prior to the final determination of this appeal, by the sheriff of Ada County, Idaho, who acts in such matter under the direction of said appellees and their attorneys.

5. That appellant believes it has a good, valid and meritorious defense to said judgment so entered against it without notice as aforesaid, and it has no plain, speedy or adequate remedy at law, and it will be deprived of its right of appeal and of its property without due process of law, and it will be required to pay a judgment which it believes to be most unconscionable, inequitable and unjust and which was entered against it as aforesaid without notice.

6. Your petitioner begs to refer, for a more complete statement of the facts and of the matters that have transpired prior to this petition in connection with said judgment and appellant's effort to obtain justice, to the record on appeal now on file with the Clerk of this Honorable Court.

7. Appellant offers to do equity and to furnish a good and sufficient bond by the Fidelity and Deposit Company of Maryland as surety (a corporation duly licensed and authorized to do business as a surety company in the State of Idaho and to execute bonds in this court), to indemnify the said appellees and each of them against all losses, costs and damages that may be sustained by appellees by reason of any order restraining and enjoining the sale of said securities and the collection of said judgment during the pendency of said appeal, or a bond conditioned as this Honorable Court or a Judge thereof may deem proper for the protection of said appellees.

Your petitioner therefore prays that an injunction or restraining order, or an order in the nature

of a supersedeas, be issued, made and entered herein pending the final disposition of this cause and to preserve and protect the subject matter of the litigation during the pendency of said appeal.

Dated this 6th day of August, 1931.

OLIVER O. HAGA,
McKEEN F. MORROW,
FRANK MARTIN,
Solicitors for Appellant.
Residence: Boise, Idaho.

United States of America,
District of Idaho,
County of Ada,—ss.

Oliver O. Haga, being first duly sworn, deposes and says: That he is one of the attorneys for the American Surety Company of New York, appellant in the above-entitled cause, and that he makes this verification for and on behalf of said appellant for the reason that he is more familiar with the facts set forth in said petition than are any of the officers of said appellant and for the further reason that none of appellant's officers reside in or are now within the State of Idaho or in Ada County, said state, where this affiant resides; that he has personal knowledge of the facts set forth in the foregoing petition, except such facts as are stated or alleged to be on information and/or belief; that he has obtained his said knowledge and information from an examination of the official records of the courts referred to in said petition in the actions and causes mentioned in said petition and from an examnation of original files and records of appellant relative

to said bond or undertaking; that he has read said petition and that the facts therein stated are true of affiant's own knowledge, except the facts stated or alleged to be on information and/or belief, and as to such facts he believes them to be true.

OLIVER O. HAGA.

Subscribed and sworn to before me this 6th day of August, 1931.

[Seal] H. M. JEFFREY,
Residence: Boise, Idaho.

Service of the foregoing petition and receipt of copy thereof with notice that the same will be presented to the Circuit Court of Appeals for the Ninth Circuit or a Judge thereof at Chambers on August 10, 1931, at 10:30 o'clock A. M., or as soon thereafter as counsel can be heard.

JAMES F. AILSHIE, Jr.,
J. R. SMEAD,
Solicitors for Appellees.

[Endorsed]: Petition for Order to Preserve the Subject Matter of the Litigation Pending Appeal. Filed Aug. 10, 1931. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 6566.

AMERICAN SURETY COMPANY OF NEW YORK, a Corporation,

Appellant,

vs.

VIVIAN F. BALDWIN and E. R. BALDWIN,

Appellees.

MOTION OF APPELLEES TO DISMISS.

Come now the appellees and move this Honorable Court and the Honorable William H. Sawtelle, one of the Judges thereof, to dismiss appellant's application for temporary restraining order pending appeal upon each and every of the grounds set forth in appellees' motion to dismiss appellant's bill of complaint filed in the District Court of the United States for the District of Idaho, and certified to the Clerk of this court and now on file herein.

JAMES F. AILSHIE, Jr.,
J. R. SMEAD,
Solicitors for Appellees.

[Endorsed]: Motion of Appellees to Dismiss. Filed Aug. 10, 1931. Paul P. O'Brien, Clerk.

At a stated term, to wit, the October Term, A. D. 1930, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Monday, the tenth day of August, in the year of of our Lord one thousand nine hundred and thirty-one. Present: Honorable WILLIAM H. SAWTELLE, Circuit Judge, Presiding; Honorable A. F. ST. SURE, District Judge.

[Title of Cause.]

ORDER OF SUBMISSION ON MOTION FOR ORDER TO PRESERVE SUBJECT MATTER PENDING APPEAL, ETC.

ORDERED petition of appellant for order to preserve subject matter of suit pending appeal, this day filed, argued by Mr. Oliver A. Haga, counsel for the appellant, and in support of said petition, and by Mr. James F. Ailshie, Jr., counsel for appellees, and in opposition to said petition, and submitted to Wilbur and Sawtelle, Circuit Judges, and St. Sure, District Judge.

Upon application of counsel for appellees, IT IS ORDERED that leave be granted said counsel to file motion to dismiss.

FURTHER ORDERED, pursuant to oral stipulation of counsel for the respective parties, that the sale of the securities mentioned in the petition may be postponed to August 15th at 11:00 o'clock A. M.

In the District Court of the Third Judicial District of the State of Idaho, in and for Ada County.

VIVIAN F. BALDWIN and E. R. BALDWIN,
Plaintiffs,

vs.

ED ANDERSON and AMERICAN SURETY COMPANY OF NEW YORK, a Corporation,
Defendants.

STIPULATION POSTPONING SALE OF CERTAIN SECURITIES, ETC., IN CIRCUIT COURT OF MONTANA.

IT IS HEREBY STIPULATED AND AGREED, by and between the plaintiffs and the defendants Ed. Anderson and American Surety Company of New York, that the sale of certain securities belonging to the American Surety Company of New York, heretofore noticed by the sheriff of Ada County, Idaho, for August 14, 1931, shall be postponed until the 15th day of August, 1931, at the hour of 11:00 o'clock A. M.

This stipulation is made by all parties without waiver of any rights on behalf of any of them except as to the continuance of said sale.

Dated this 10th day of August, 1931.

JAMES F. AILSHIE, Jr.,
J. R. SMEAD,
Attorneys for Plaintiffs.

_____,
Attorney for Defendant E. Anderson.

RICHARDS & HAGA,
Attorneys for Defendant, American Surety Co. of New York.

Certified as correct.

O. O. HAGA.
JAMES F. AILSHIE, Jr.

[Endorsed]: Copy of Stipulation Postponing Sale of Certain Securities, etc., in Circuit Court of Montana. Received Aug. 10, 1931. Paul P. O'Brien, Clerk.

At a stated term, to wit, the October Term, A. D. 1930, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Friday, the fourteenth day of August, in the year of our Lord one thousand nine hundred and thirty-one. Present: Honorable A. F. ST. SURE, District Judge, Presiding; Honorable HAROLD LOUDERBACK, District Judge.

[Title of Cause.]

ORDER GRANTING PETITION FOR TEMPORARY INJUNCTION AND RESTRAINING ORDER, ETC.

Upon consideration of the petition of appellant for issuance of writ of injunction and/or restraining order directed to the sheriff of Ada County, Idaho, and of the papers filed in the case by counsel for respective parties, and good cause therefor appearing, and by direction of the Court,—

IT IS ORDERED that the writ of injunction and restraining order issue as prayed for upon the giving of supersedeas bond in the sum of Thirty Thousand Dollars ($30,000.00).

(WILBUR, Circuit Judge, did not participate in this matter.)

NEW YORK CASUALTY COMPANY.

In the Circuit Court of Appeals for the Ninth Circuit.

AMERICAN SURETY COMPANY OF NEW YORK, a Corporation,

Appellant,

vs.

VIVIAN F. BALDWIN and E. R. BALDWIN,

Appellees.

BOND.

KNOW ALL MEN BY THESE PRESENTS, That we, American Surety Company of New York, a corporation, as principal, and New York Casualty Company, a corporation, as surety, are held and firmly bound unto Vivian F. Baldwin and E. R. Baldwin in the full and just sum of Thirty Thousand Dollars ($30,000), to be paid to the said Vivian F. Baldwin and E. R. Baldwin, their heirs, executors, administrators or assigns, which payment well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally by these presents.

Sealed with our seals and dated this 10th day of August, 1931.

WHEREAS, the said American Surety Company of New York is appellant and the said Vivian F. Baldwin and E. R. Baldwin are appellees in said cause now pending in the United States Circuit Court of Appeals for the Ninth Circuit on appeal from the District Court of the United States for the District of Idaho, Southern Division, from a decree dismissing appellant's bill and an order denying appellant's motion for a preliminary injunction against appellees, and the said appellant having petitioned the said United States Circuit Court of Appeals of the Ninth Circuit for an order restraining and enjoining the said appellees, Vivian F. Baldwin and E. R. Baldwin, their agents, servants, employees and attorneys, and those acting for them or under their order or direction, or in active con-

cert or participation with them, or either of them, from collecting or attempting to collect during the pendency of said appeal a certain judgment obtained by said appellees against said appellant in the District Court of the Third Judicial District of the State of Idaho, in and for Ada County, on the 23d day of June, 1930, for $22,357.21, together with costs and interest, and from selling or attempting to sell during the pendency of said appeal any of the bonds or securities of appellant deposited by it with the State Treasurer of the State of Idaho under Section 5104 of the Compiled Statutes of Idaho 1919 for the purpose of qualifying appellant to do and carry on a surety business in said state, and an order having been duly issued that appellees be so restrained and enjoined upon this undertaking being given and filed;

NOW, THE CONDITION OF THE ABOVE OBLIGATION IS SUCH, that if the appellant, American Surety Company of New York, shall until sixty (60) days after the final determination of this cause, maintain with the State Treasurer of the State of Idaho not less than $25,000 actual value of securities of the type and kind required to be deposited with said State Treasurer under Section 5104 of the Compiled Statutes of Idaho, 1919, free and clear of levy under any execution issued in any other cause, and shall pay all such costs and damages as may be incurred, suffered or sustained by appellees if it be found they have been wrongfully enjoined or restrained by the order so issued or by any writ that may be issued by said Court pursuant to said order, not exceeding the sum of Thirty Thou-

sand Dollars ($30,000), then the above obligation to be void, otherwise to remain in full force and effect.

AMERICAN SURETY COMPANY OF NEW YORK.

By R. D. WELDON,
Resident Vice-President.

[Seal] Attest: B. DUCRAY,
Resident Assistant Secretary.

NEW YORK CASUALTY COMPANY.

By BREWSTER CAMERON,
Resident Vice-President.

[Seal] Attest: L. T. PLATT,
Resident Assistant Secretary.

Bond approved August 14th, 1931.

A. F. ST. SURE,
Judge, U. S. Circuit Court of Appeals for Ninth Circuit (Pursuant to Designation).

State of California,
City and County of San Francisco.

On this tenth day of August, in the year one thousand nine hundred and thirty-one, before me, John McCallan, a notary public in and for said City and County, State aforesaid, residing therein, duly commissioned and sworn, personally appeared R. D. Weldon and B. Ducray, known to me to be the resident vice-president and resident assistant secretary respectively of the American Surety Company of New York, the corporation described in and that executed the within and foregoing instrument, and known to me to be the persons who executed the said instrument on behalf of the said corporation,

and they both duly acknowledged to me that such corporation executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, at my office, in the said City and County of San Francisco, the day and year in this certificate first above written.

[Seal] JOHN McCALLAN,
Notary Public in and for the City and County of San Francisco, State of California.
My commission expires Apr. 12, 1933.

State of California,
City and County of San Francisco.

On this tenth day of August, in the year one thousand nine hundred and thirty-one, before me, John McCallan, a notary public in and for said City and County, State aforesaid, residing therein, duly commissioned and sworn, personally appeared Brewster Cameron and L. T. Platt, known to me to be resident vice-president and resident assistant secretary respectively of the New York Casualty Company, the corporation described in and that executed the within and foregoing instrument, and known to me to be the persons who executed the said instrument on behalf of the said corporation, and they both duly acknowledged to me that such corporation executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, at my office, in the said City and County of San Francisco, the day and year in this certificate first above written.

[Seal] JOHN McCALLAN,
Notary Public in and for the City and County of San Francisco, State of California.
My commission expires April 12, 1933.

[Endorsed]: Bond. Filed Aug. 14, 1931. Paul P. O'Brien, Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 6566.

AMERICAN SURETY COMPANY OF NEW YORK, a Corporation,

Appellant,

vs.

VIVIAN F. BALDWIN and E. R. BALDWIN,

Appellees.

WRIT OF INJUNCTION.

United States of America,—ss.

The President of the United States of America, to Vivian F. Baldwin and E. R. Baldwin:

WHEREAS, at a hearing before the United States Circuit Court of Appeals for the Ninth Circuit, held at San Francisco, California, on the 10th day of August, 1931, on the verified petition of appellant for an order restraining appellees from committing certain acts during the pendency of the appeal herein, at which hearing the parties appeared by their counsel, and thereupon an order was made and entered restraining appellees from committing the acts hereinafter specified during the pendency of said appeal upon the condition that appellant shall until sixty (60) days after the final determination of this cause, maintain with the State Treasurer of the State of Idaho not less than Twenty-five

Thousand Dollars ($25,000) actual value of securities of the type and kind required to be deposited with said State Treasurer under Section 5104 of the Compiled Statutes of Idaho, 1919, free and clear of levy under any execution issued in any other cause, and shall file with this court a surety bond in the sum of Thirty Thousand Dollars ($30,000) conditioned as provided in said order, and

WHEREAS, the appellant has filed said bond with the Clerk of this court in the amount aforesaid and conditioned as required by said order and which said bond has been duly approved by a Judge of said court,—

NOW, THEREFORE, YOU, the said Vivian F. Baldwin and E. R. Baldwin, and your agents, servants, employees and attorneys, and those acting for you or under your order or direction or in active concert or participation with you, or either of you, be and you hereby are commanded, enjoined and restrained during the pendency of said appeal, or until the further order of the Court in the premises, as follows:

(a) From collecting or attempting to collect from appellant that certain judgment made and entered in the District Court of the Third Judicial District of the State of Idaho, in and for Ada County, in an action wherein you, the said appellees, were plaintiffs and one Ed Anderson and Singer Sewing Machine Company were defendants, which judgment bears date the 23d day of June, 1930, and is for the principal sum of $22,357.21, with interest and costs, and from harassing or annoying the said appellant with the collection or enforcement of said

judgment, or any part thereof, and from taking or receiving any moneys under said judgment, or in payment or satisfaction thereof, unless such payment be voluntarily made by appellant;

(b) From selling or attempting to sell under execution, whether heretofore or hereafter issued, upon said judgment or otherwise, appellant's bonds and securities of the par value of Twenty-five Thousand Dollars ($25,000) or any part thereof, deposited by appellant with the State Treasurer of the State of Idaho pursuant to the provisions of Section 5104 of the Compiled Statutes of Idaho, 1919, or otherwise, for the purpose of qualifying appellant to do and carry on a surety business in the State of Idaho, and from levying execution upon such securities and from permitting further proceedings under any execution heretofore issued and levied upon such bonds and securities, except to release such securities from levy under such execution and return the execution unsatisfied to the Court from which it issued.

That the failure of appellant to maintain and keep on deposit with the State Treasurer of the State of Idaho the said securities hereinbefore referred to, free and clear of levy under any execution issued in any other cause, shall be cause for vacating this writ.

WITNESS, The Honorable CHARLES EVANS HUGHES, Chief Justice of the United States, and the seal of this Court, this 14th day of August, 1931.

[Seal] PAUL P. O'BRIEN,
Clerk, United States Circuit Court of Appeals for the Ninth Circuit.

Let the foregoing writ issue.

A. F. ST. SURE,

Judge of the United States Circuit Court of Appeals for the Ninth Judicial Circuit (Pursuant to Designation).

Service of the foregoing writ of injunction and receipt of certified copy is hereby acknowledged this 17th day of August, 1931.

JAMES F. AILSHIE, Jr.,
J. R. SMEAD,

Attorneys for Appellees Vivian F. Baldwin and E. R. Baldwin.

Service of the foregoing writ of injunction and receipt of certified copy is hereby acknowledged this 17th day of August, 1931.

JOHN McGRATH,
Sheriff, Ada County, Idaho.

[Endorsed]: Writ of Injunction. Filed Sep. 8, 1931. Paul P. O'Brien, Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 6566.

AMERICAN SURETY COMPANY OF NEW YORK, a Corporation,

Appellant,

vs.

VIVIAN F. BALDWIN and E. R. BALDWIN,

Appellees.

ORDER RESTRAINING APPELLEES DURING PENDENCY OF APPEAL.

This cause came on to be heard before the court upon the verified petition of appellant for an order restraining appellees from doing certain acts which it is alleged will destroy the subject matter of the litigation during the pendency of the appeal herein, and the parties have appeared by their counsel.

It has been made to appear from the petition and the record and files in the cause that appellant, American Surety Company of New York, has prosecuted an appeal to this court to reverse the decree of the United States District Court for the District of Idaho, Southern Division, dismissing its bill of complaint and denying its motion for a preliminary injunction against appellees; that said appeal was perfected on the 5th day of August, 1931, and the record on appeal filed in this court on the 10th day of August, 1931, and that the subject matter of this litigation will be destroyed during the pendency of the appeal and before the cause can be heard by this court, and that appellant's appeal will accordingly become futile and ineffectual, unless appellees be restrained and enjoined as hereinafter provided and as prayed by appellant.

IT IS THEREFORE ORDERED:

1. That appellant, American Surety Company of New York, shall until sixty (60) days after the final determination of this cause, maintain with the State Treasurer of the State of Idaho not less than Twenty-five Thousand Dollars ($25,000) actual

value of securities of the type and kind required to be deposited with said State Treasurer under sec. 5104 of the Compiled Statutes of Idaho, 1919, free and clear of levy under any execution issued in any other cause.

2. That upon said appellant filing a surety bond approved by this Court, or a Judge thereof, in the sum of Thirty Thousand Dollars ($30,000), conditioned that appellant shall maintain and keep on deposit with the State Treasurer of Idaho securities of the kind and to the amount provided in paragraph 1 hereof, free and clear of levy under any execution issued in any other cause, and shall pay all such costs and damages as may be incurred, suffered or sustained by appellees if it be found that they have been wrongfully enjoined or restrained, the said appellees Vivian F. Baldwin and E. R. Baldwin, their agents, servants, employees and attorneys, and those acting for them or under their order or direction, or in active concert or participation with them, or either of them, be and the same hereby are and each of them is enjoined and restrained during the pendency of said appeal or until the further order of the Court in the premises, as follows:

(a) From collecting or attempting to collect from appellant that certain judgment made and entered in the District Court of the Third Judicial District of the State of Idaho, in and for Ada County, in an action wherein the said appellees were plaintiffs and one Ed Anderson and Singer Sewing Machine Company were defendants, which judgment bears date the 23d day of June, 1930,

and is for the principal sum of $22,357.21, with interest and costs, and from harassing or annoying the said appellant with the collection or enforcement of said judgment, or any part thereof, and from taking or receiving any moneys under said judgment, or in payment or satisfaction thereof, unless such payment be voluntarily made by appellant;

(b) From selling or attempting to sell under execution, whether heretofore or hereafter issued, upon said judgment, or otherwise, appellant's bonds and securities of the par value of $25,000.00, or any part thereof, deposited by appellant with the State Treasurer of the State of Idaho pursuant to the provisions of section 5104 of the Compiled Statutes of Idaho, 1919, or otherwise, for the purpose of qualifying appellant to do and carry on a surety business in the State of Idaho, and from levying execution upon such securities and from permitting further proceedings under any execution heretofore issued and levied upon such bonds and securities, except to release such securities from levy under such execution and return the execution unsatisfied to the Court from which it issued.

3. That the failure of appellant to maintain and keep on deposit with the State Treasurer of the State of Idaho the said securities hereinbefore referred to, free and clear of levy under any execution issued in any other cause, shall be cause for vacating this order and the writ issued pursuant thereto.

4. That a writ of injunction issue under the seal of the Court in harmony with this order upon the approval of the bond tendered by appellant.

Dated August 14, 1931.

A. F. ST. SURE,

Presiding Judge of the United States Circuit Court of Appeals for the Ninth Circuit (Pursuant to Designation).

Service of the foregoing order restraining appellees during pendency of appeal, and receipt of certified copy is hereby acknowledged this 17th day of August, 1931.

JAMES F. AILSHIE, Jr.,
J. R. SMEAD,

Attorneys for Appellees Vivian F. Baldwin and E. R. Baldwin.

Service of the foregoing order restraining appellees during pendency of appeal, and receipt of certified copy is hereby acknowledged this 17th day of August, 1931.

JOHN McGRATH,
Sheriff, Ada County, Idaho.

[Endorsed]: Order Restraining Appellees During Pendency of Appeal. Filed Sep. 8, 1931. Paul P. O'Brien, Clerk.

At a stated term, to wit, the October Term, A. D. 1931, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Monday, the fourteenth day of December, in the year of our Lord one thousand nine hundred

and thirty-one. Present: Honorable CURTIS D. WILBUR, Senior Circuit Judge, Presiding; Honorable WILLIAM H. SAWTELLE, Circuit Judge; Honorable WILLIAM P. JAMES, District Judge.

[Title of Cause.]

ORDER OF SUBMISSION.

ORDERED above cause argued by Mr. Oliver O. Haga, counsel for the appellant, and by Mr. John R. Smead, counsel for the appellees, and submitted to the court for consideration and decision.

At a stated term, to wit, the October Term, A. D. 1931, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Monday, the eighteenth day of January, in the year of our Lord one thousand nine hundred and thirty-two. Present: Honorable CURTIS D. WILBUR, Senior Circuit Judge, Presiding; Honorable WILLIAM H. SAWTELLE, Circuit Judge; Honorable PAUL J. McCORMICK, District Judge.

[Title of Cause.]

ORDER DIRECTING FILING OF OPINION AND FILING AND RECORDING OF DECREE.

By direction of the Court, ORDERED that the typewritten opinion this day rendered by this court in above cause be forthwith filed by the Clerk and that a decree be filed and recorded in the minutes of this court in accordance with the opinion rendered.

[Title of Court and Cause.]

OPINION U. S. CIRCUIT COURT OF APPEALS.

Upon Appeal from the District Court of the United States for the District of Idaho, Southern Division.

Before WILBUR and SAWTELLE, Circuit JJ., and JAMES, District J.

WILBUR, Circuit Judge.—This is an appeal from an order of the District Court denying an injunction *pendente lite* and dismissing appellant's bill in equity on the ground that the facts stated therein did not entitle appellant to relief. The bill prays for an injunction to prevent defendants, hereinafter referred to as appellees, from enforcing a judgment entered in their favor and against appellant for the sum of $22,357.21 in the District

Court for the Third Judicial District of the State of Idaho. The judgment in question was entered against appellant without notice upon a supersedeas bond given by it to stay execution pending an appeal to the Supreme Court of Idaho. It is unquestioned that such a judgment may be entered in that manner, if justified by the terms of the bond. It was expressly so held by this court in U. S. Fidelity & Guaranty Co. vs. Ft. Misery Highway District, 22 F. (2d) 369, with reference to such a bond also given in the state of Idaho. The controversy in this case arises out of the fact that there are two defendants in the action in which the supersedeas bond was given, the Singer Sewing Machine Company and one Ed Anderson who was claimed to be an employee of the Singer Sewing Machine Company in an action to recover damages for personal injuries. Judgment was rendered against both defendants in that action and an appeal was taken by both. The appeal of the Singer Sewing Machine Company was sustained and the judgment against it reversed, while the judgment against its co-defendant, Anderson, was affirmed. Thereafter the trial court, upon motion of the plaintiff therein, without any notice whatsoever to the surety company, appellant herein, entered a judgment against it for the full amount of the judgment against Anderson, together with interest and costs. Claim is made here by appellees that the supersedeas bond in question was given to stay the whole judgment against both defendants in that action and therefore that the entry of judgment against the surety company without notice was proper. On the other

hand, it is claimed by the surety company that the bond was given solely on behalf of the Singer Sewing Machine Company and that when the appeal of that company was successful its obligation upon the bond ceased. In view of this controversy we will hereinafter set out the bond in full. Immediately after the entry of the judgment against the appellant in the aforesaid action, appellant moved the District Court to vacate the judgment. The motion was granted and an order entered vacating the judgment. From this order an appeal was taken by the plaintiffs therein, appellees here, to the Supreme Court of Idaho, which court, reversed the order of the District Court setting aside the judgment against the appellant and reinstated the said judgment. (Baldwin vs. Anderson, 299 P. 341.) This decision was based on the proposition that the trial court had no jurisdiction to set aside its judgment under the circumstances and that the remedy of the surety company was by an appeal from the judgment. In the meantime, the period for appeal had expired under the Idaho statute, unless that period was tolled by the pendency of the proceeding to vacate the judgment and the appeal therefrom. After the decision by the Supreme Court of Idaho, holding that the order of the trial judge vacating the judgment was unauthorized, an appeal was taken from the judgment by the appellant herein, but unless the time for taking that appeal was tolled by the proceeding above mentioned it was too late. Appellant calls attention to a later decision rendered by the Supreme Court of Idaho in a similar case, holding that the pendency of pro-

ceedings to vacate a judgment and of an appeal from the order vacating the judgment did not toll the statute as to the time of appeal from the judgment itself and that an appeal taken after the expiration of the statutory period was too late. Mountain States Implement Co. vs. Arave, 2 P. (2d) 314.

Appellant has also filed a petition for a writ of certiorari in the Supreme Court of the United States to review the judgment of the Supreme Court of Idaho on the appeal from the order setting aside the judgment in question. At the time of this opinion the petition has not been acted on.

The supersedeas bond herein referred to is as follows:

"In the District Court of the Third Judicial District of the State of Idaho, in and for the County of Ada.

VIVIAN F. BALDWIN and E. R. BALDWIN,
Plaintiffs,

vs.

SINGER SEWING MACHINE COMPANY, a Corporation, and ED ANDERSON,
Defendants.

UNDERTAKING ON APPEAL.

Whereas the defendant, Singer Sewing Machine Company, a corporation, in the above-entitled action has appealed to the Supreme Court of the State of Idaho from the judgment made and entered against it in the above-entitled action and in the above-entitled court in favor of the plaintiffs in

said action on the 31st day of May, 1928, for the sum of Nineteen Thousand Five Hundred ($19,-500) Dollars and for Seventy-three and 70/100 ($73.70) Dollars costs in said suit, making a total of Nineteen Thousand Five Hundred Seventy-three and 70/100 ($19,573.70) Dollars, and from the whole of said judgment;

And whereas, the said appellant, Singer Sewing Machine Company, a corporation, is desirious of staying the execution of said judgment so appealed from;

Now, therefore, the undersigned American Surety Company, a corporation authorized to, and doing business in the State of Idaho, in consideration of the premises and of such appeal on the part of said appellant, Singer Sewing Machine Company, a corporation, does hereby acknowledge itself firmly bound in the sum of Twenty-five Thousand ($25,-000.00) Dollars, gold coin of the United States, that if the said judgment appealed from, or any part thereof, be affirmed, or the appeal dismissed, the appellant will pay in gold coin of the United States of America, the amount directed to be paid as to which said judgment shall be affirmed, if affirmed only in part, and all damages and costs which may be awarded against the appellant upon the appeal, and that if the said appellant does not make such payment within thirty days from the filing of the remittitur from the Supreme Court in the court from which the appeal is taken, judgment may be entered on motion of the respondents in their favor and against the undersigned surety

for the said sum of Nineteen Thousand Five Hundred Seventy-three and 70/100 ($19,573.70) Dollars, together with the interest that may be due thereon and the damages and costs which may be awarded against the said appellant, Singer Sewing Machine Company, upon the appeal.

In witness whereof, the said American Surety Company has caused its name and seal to be attached hereto by its proper officers and agents at Boise, Idaho, this 28th day of August, 1928."

The Supreme Court of Idaho in passing upon the validity of the order of the District Court vacating the judgment against appellant herein refused to consider the question as to whether or not the supersedeas bond or undertaking applied only to such judgment as might be affirmed against the Singer Sewing Machine Company, or whether it applied to the entire judgment. The court in that regard stated as follows:

> "The question or issue presented was, did the Surety Company, in its undertaking, become a party liable for every part of the judgment appealed from which might be affirmed by the Supreme Court, or did it stipulate only as to such judgment or part thereof as might be affirmed against the Singer Sewing Machine Company? To answer this question the court must look to the bond. The issue required a construction of the bond as a whole. The trial court had jurisdiction of this question. It construed the bond in favor of appellants and against the Surety Company. It was not only

in that court's power, but it was its duty, to decide the question submitted. In re Clerf, (Wn.) 104 P. 622; Windfrey vs. Benton, (Okla.) 106 P. 853. Whether it decided right or wrong its decision was a judgment which could be reviewed for error, if there was error, only by this court on appeal. Bunnell and Eno etc. Co. vs. Curtis, *supra;* Taylor vs. Hulett, *supra;* Wyllie vs. Kent, *supra;* United States Nat. Bank vs. Eldredge, *supra.* On appeal the question could be re-examined. The undertaking cannot be examined and its legal effect as to this issue be determined by us on this appeal. We may consider it only in so far as to determine whether its wording is such that it afforded color or legal right in appellants to judgment. That is to say, whether appellants' motion presented a legitimate question and was not an imposition or fraud upon the court. We think, regardless of what our construction of the bond might be, it cannot be said appellants held no right to submit the question. Nor can it be said that such submission was a fraud upon the court and on that ground its judgment was void."

Justice Budge, however, dissented from the conclusion of the court and gave his view as to the proper interpretation of the bond in question. As we fully concur in the views expressed by Justice Budge with reference to the nature and effect of this bond, we quote as follows from his opinion:

"The supersedeas bond upon its face and throughout its contents shows clearly that it was given to stay execution upon the judgment and the whole thereof entered against the Sewing Machine Company. Anderson's name nowhere appears in the bond, and in order to uphold the judgment entered upon the supersedeas bond it becomes necessary for the court to read into the bond that it was given to stay execution of the judgment against Anderson as well as against the Sewing Machine Company. This the court has no authority to do. * * *

"It affirmatively appears from the condition of the bond as above set out that the bond was given solely for the purpose of staying execution against the Singer Sewing Machine Company, with the amount of the judgment payable only in the event the judgment against the Singer Sewing Machine Company or any part thereof be affirmed. If the judgment against the Sewing Machine Company had been affirmed in part the bond would be answerable to the extent of the affirmance."

The bond then was one given on behalf of the Singer Sewing Machine Company. Its stipulation, by its express terms and also as implied from the statute under which it was given, was an agreement that, in the event the judgment against the Singer Sewing Machine Company was affirmed, judgment might be entered against the surety without notice. There was no agreement that judgment could be entered against it without notice in any other event,

as was done in the case at bar. The surety agreed to stand good for the obligation of the Singer Sewing Machine Company if that obligation was affirmed by the Supreme Court of Idaho on appeal. But that court held that there was no obligation on the part of the Singer Sewing Machine Company, and reversed the judgment against it. By the ex parte judgment entered, the surety was called upon to answer for an entirely different obligation, that of Anderson.

It is said that a surety, by entering into the obligation upon its supersedeas bond, makes itself a party to the action and is bound by all subsequent proceedings, even though erroneously taken against it. This, to a certain extent, is true, as was held by this court in U. S. Fidelity & Guaranty Co. vs. Ft. Misery Highway District, 22 F. (2d) 369, *supra.* The difficulty here is that the agreement of the appellant, that a judgment should be entered against it without notice, was confined to a judgment in the event that the judgment against its principal was affirmed. It was reversed. In the absence of such affirmance there was no agreement or authority for entering a judgment *ex parte.* The waiver of notice applied only in the event that the judgment against the Singer Sewing Machine Company was affirmed.

In National Exchange Bank vs. Wiley, 195 U. S. 257, the Supreme Court had occasion to deal with a consent judgment which was entered without any notice whatever, under and pursuant to the terms of a promissory note providing that a judgment might be so entered. It was held that where the express terms of the note did not, in the view of

the Supreme Court, authorize the entry of a judgment by the payee after he ceased to be the holder thereof that the judgment was void and unenforceable. In that regard the Court stated as follows (p. 270):

> "But we are of opinion that that court had no authority or jurisdiction to render judgment against the obligors, if the National Exchange Bank had in fact sold the note and ceased before the commencement of that suit to own it or to be entitled to receive the proceeds to its own use. *I* was, in such case, in legal effect, a personal judgment without service of process upon the defendants and without their appearance in person or by an authorized attorney. The proceedings were wanting in due process of law. The obligors never consented to judgment by confession in favor of one who was not the owner of the note or entitled to receive its proceeds, and the warrant of attorney cannot be held to have authorized such a confession."

We think there is no distinction in principle between that case and the case at bar. In that case it was held that by the terms of the note the payor had not consented to a judgment by confession in favor of the payee after the payee had parted with title. Consequently, the judgment having been entered without actual notice to him it was void.

In the case of a supersedeas bond, although, as we have stated, the surety has frequently been referred to as a party to the action his relationship to the

case is not strictly that of a party. His relationship is fixed by the terms of the bond and the statute under which it is given. Giving the utmost effect to the decisions of the courts in that regard, they do not go further than to hold that the surety stands in the shoes of his principal. We are not dealing here with a case where a judgment is rendered erroneously by a court after it has acquired jurisdiction of the parties, but with one where it has not acquired jurisdiction of the surety, because the surety has neither waived notice nor been given notice.

It follows from what we have said that the judgment against the surety company was not only erroneous but wholly void as having been given without notice or hearing in violation of the federal constitution. National Exchange Bank vs. Wiley, 195 U. S. 257, *supra.* This view is inconsistent with the decision of the Supreme Court of Idaho, but the majority of the court there assumed upon the appeal in question that the surety was in court at the time of the hearing of the motion for judgment against it and that therefore the court not only had jurisdiction of the subject matter of the judgment but of the parties and that its decision, although erroneous, was not void. We would concur in this opinion if the premise were granted that the surety was in court at the time the trial court entered the judgment against it.

With reference to the remedy of appellant in the state courts by appeal or otherwise, appellant relies on the rule frequently stated by the federal courts, that the existence of a plain, speedy and adequate remedy in the state courts is no bar to the mainte-

nance of an action in equity in the federal courts. The rule is stated by this court in Franklin vs. Nevada-California Power Co., 264 F. 643, 645, as follows:

> " * * * the law is that the adequate remedy at law which is the test of equitable jurisdiction in the federal courts must exist in those courts. The fact of the existence of such a remedy in a state court is immaterial."

This rule was invoked by the Supreme Court in Simon vs. Southern Railway, 236 U. S. 115, upholding the jurisdiction of a federal court in equity where a judgment was obtained in a state court against the railroad company without notice to it. It is there said (p. 122):

> "Much more so will equity enjoin parties from enforcing those obtained without service. For in such a case the person named as defendant 'can no more be regarded as a party than any other member of the community.' Such judgments are not erroneous and not voidable but upon principles of natural justice, and under the due process clause of the Fourteenth Amendment, are absolutely void. They constitute no justification to a plaintiff who is concerned in executing such judgments is considered in law as a mere trespasser. * * *
>
> "On principle and authority, therefore, a judgment, obtanied in a suit of which the defendant, had no notice, was a nullity and the party against whom it was obtained was entitled to relief."

The same rule was applied in a more recent case by the Supreme Court, Risty vs. Chicago, R. I. & Pac. Ry. Co., 270 U. S. 378, where it was said (p. 388):

> "The remedy by appeal to the state court under § 8469 does not appear to be coextensive with the relief which equity may give. In any event, it is not one which may be availed of at law in the federal courts, and the test of equity jurisdiction in a federal court is the inadequacy of the remedy on the law side of that court and not the inadequacy of the remedies afforded by the state courts. Smyth v. Ames, 169 U. S. 466; Chicago, B. & Q. R. R. Co. vs. Osborne, *supra.*"

The rule was applied by the Circuit Court of Appeals for the Fourth Circuit in Firestone Rubber Co. vs. Marlboro Cotton Mills, 282 F. 811, where the equity jurisdiction of the federal court was invoked, by reason of diversity of citizenship, to restrain enforcement of a final judgment in a state court, obtained without proper service, notwithstanding the existence of a remedy in the state court, by petition to have the judgment set aside.

As we understand, the appellees do not question the jurisdiction of a federal court of equity to entertain the bill, notwithstanding the existence of the remedy in the state courts but contend that under the ordinary rules of equity procedure the federal court should refuse to take jurisdiction; or, otherwise stated, "having jurisdiction, refuse to entertain complainant's bill or to act in the premises," on the

ground of comity. In support of this contention appellees cite Gresham vs. Boston etc. R. R. Co., 14 F. 753; Denton vs. Baker, 93 F. 46; Strand vs. Griffith, 144 F. 828; Bower vs. Stone, 177 F. 673; Eggers vs. Krueger, 236 F. 852; Simonitsch vs. Bruce, 258 F. 331. None of these cases apply to a situation where the petitioner sought to avoid the effect of a judgment entered against it without due process of law. The difficulty in the case at bar is that appellant has not had its day in court. When it applied to the state district court to have the judgment vacated, it might have been bound by an adverse decision of that court if one had been rendered were it not for the fact, as subsequently determined by the Supreme Court of the state, that the District Court of the state had no jurisdiction to consider the question at all; that the Supreme Court of Idaho alone had jurisdiction to correct the error on appeal.

Appellees also contend that the pendency of its appeal to the Supreme Court of Idaho, and of its petition for a writ of certiorari to the Supreme Court, precluded the appellant from proceeding in equity in the federal court. But the rule is otherwise. Borden's Condensed Milk Co. vs. Baker, 177 F. 906, 911. The bill stated a cause of action for relief in equity.

Appellees object to the verification of the bill by one of the solicitors for the appellant. The verification recites the source of affiant's knowledge as:

> " * * * from the records and decisions of said court (District Court Third Judicial

District) and the Supreme Court of the State of Idaho and from other sources which be believes to be reliable; that he has read the above and foregoing complaint and believes the facts therein stated to be true."

Upon the hearing of the motion for an injunction, appellees presented copies of all the documents involved in the matter, covering about 160 pages of the transcript, and also affidavits of the appellees' attorney and by the trial judge affirmatively showing that the judgment in question was entered *without any notice whatsoever to the appellant,* upon the representation by appellees' attorney that such notice would be entirely unnecessary. If there is any defect in the verification of the bill as it affected the right to an injunction pendente lite it was cured by the appellees' evidence covering practically all of the allegations of the bill.

The temporary injunction should have been granted. The decree of dismissal and the order denying the application for a temporary injunction are reversed, and the trial court is directed to grant a temporary injunction as prayed for.

[Endorsed]: Opinion. Filed Jan. 18, 1932. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 6566.

AMERICAN SURETY COMPANY OF NEW YORK, a Corporation,

Appellant,

vs.

VIVIAN F. BALDWIN and E. R. BALDWIN,

Appellees.

DECREE U. S. CIRCUIT COURT OF APPEALS.

Appeal from the District Court of the United States for the District of Idaho.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Idaho, and was duly submitted.

On consideration whereof, it is now here ORDERED, ADJUDGED, AND DECREED by this Court, that the decree of dismissal and the order denying the application for a temporary injunction of the said District Court in this cause be, and hereby are, reversed, with costs in favor of the appellant and against the appellees, and that this cause be and hereby is remanded to the said District Court with directions to grant a temporary injunction as prayed for.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED by this Court, that the appellant

recover against the appellee for its costs herein expended, and have execution therefor.

[Endorsed]: Decree. Filed and entered Jan. 18, 1932. Paul P. O'Brien, Clerk.

At a stated term, to wit, the October Term, A. D. 1931, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Tuesday, the twenty-third day of February, in the year of our Lord one thousand nine hundred and thirty-two. Present: Honorable CURTIS D. WILBUR, Senior Circuit Judge, Presiding; Honorable WILLIAM H. SAWTELLE, Circuit Judge.

[Title of Cause.]

ORDER DENYING PETITION FOR A REHEARING AND PETITION FOR LEAVE TO ORALLY ARGUE PETITION FOR REHEARING.

Upon consideration of the petition of appellees, for a rehearing of above cause, and of the petition for leave to file motion for oral argument on petition for rehearing, and of the motion for oral argument on petition for rehearing, all filed on February 15, 1932, and good cause therefor appearing, IT IS ORDERED that the said petition for rehearing and motion for oral argument be, and each of them hereby is denied.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 6566.

AMERICAN SURETY COMPANY OF NEW YORK, a Corporation,

Appellant,

vs.

VIVIAN F. BALDWIN and E. R. BALDWIN,

Appellees.

MOTION FOR STAY OF MANDATE.

Come now Vivian F. Baldwin and E. R. Baldwin, appellees above named, and respectfully move the Court that the issuance under Rule 32, of the mandate of this Court be stayed to and including the 1st day of April, 1932, and in the event a petition for writ of certiorari, to be made by the appellees herein, be docketed in the Clerk's office in the Supreme Court of the United States on or before said date then the mandate of this Court be stayed until after the Supreme Court of the United States passes upon said petition.

JAMES F. AILSHIE, Jr.
J. R. SMEAD,
Counsel for Appellees.
Residence: Boise, Idaho.

Filed Feb. 23, 1932. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 6566.

AMERICAN SURETY COMPANY OF NEW YORK, a Corporation,

Appellant,

vs.

VIVIAN F. BALDWIN and E. R. BALDWIN,

Appellees.

ORDER STAYING ISSUANCE OF MANDATE.

Upon application of Messrs. James F. Ailshie, Jr., and J. R. Smead, counsel for the appellees, and good cause therefor appearing, IT IS ORDERED that the issuance, under Rule 32, of the mandate of this Court in the above cause be, and hereby is stayed to and including April 1, 1932; and in the event the petition for a writ of certiorari to be made by the appellees herein be docketed in the Clerk's office of the Supreme Court of the United States on or before said date, then the mandate of this Court is to be stayed until after the said Supreme Court passes upon the said petition.

CURTIS D. WILBUR,
United States Circuit Judge.

Dated: San Francisco, California, February 23, 1932.

Filed Feb. 23, 1932.

PAUL P. O'BRIEN,
Clerk.

[Title of Court and Cause.]

CERTIFICATE OF CLERK U. S. CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT TO RECORD CERTIFIED UNDER RULE 38 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES.

I, Paul P. O'Brien, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing two hundred and sixty-eight (268) pages, numbered from and including 1 to and including 268, to be a full, true and correct copy of the entire record of the above-entitled case in the said Circuit Court of Appeals, made pursuant to request of counsel for the appellees and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

ATTEST my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 27th day of February, A. D. 1932.

[Seal] PAUL P. O'BRIEN,
Clerk.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed April 25, 1932

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted, and the case is assigned for argument immediately following the argument in case No. 494, American Surety Co. vs. Baldwin.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.